Office-Supreme Court, U.S.
FILE
DEC 9 1982
ALEXANDER L. STEVAS,
CLERK

82-969

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AERONAUTICAL MACHINISTS LODGE 709, IAM&AW, AFL-CIO,

Petitioner,

v.

LOCKHEED GEORGIA COMPANY, DIVISION OF LOCKHEED CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

J. R. GOLDTHWAITE, JR.
Counsel of Record

ADAIR & GOLDTHWAITE, P.C.
777 West Peachtree St., N.E.
Atlanta, Georgia 30308

QUESTIONS PRESENTED

I. Whether the decision of the Court of Appeals that the District Courts may not set aside arbitration awards which fail to enforce a contract in accordance with its plain terms and which add implied contractual provisions in violation of express contractual prohibitions is inconsistent with decisions of this Court and of other Circuit Courts.**

II. Whether, when a District Court has twice found that the arbitrator was not faithful to his obligation and arbitration has twice been exhausted, the District Court may enforce the plain terms of the contract and afford a remedy to the Union.**

III. Whether the standard for award of attorney fees announced by the Circuit Court conflicts with decisions of this Court.

**Certiorari has been granted upon these issues in a reverse context in *W. R. Grace & Co. v. Rubber Workers Union*, 652 F.2d 1248 (5th Cir., Unit A, 1981) certiorari granted, No. 81-1314, June 28, 1982.

LIST OF PARTIES

The only parties to this proceeding in the Court of Appeals are those named in the caption; however, because of the wording of Eleventh Circuit Rules, Lockheed-Georgia Company filed a list of all Lockheed Corporation subsidiaries and affiliates with the Eleventh Circuit as being interested in the outcome of the case.

The International Association of Machinists and Aerospace Workers, AFL-CIO, is interested in the proceeding because of its contractual relationships with the Lockheed Corporation and its subsidiaries, but it is not a party to this case.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Statutes and Rule Involved	2
Statement of the Case	2
Statement of Facts	4
Reasons for Granting the Writ	
I. The Decision Below Conflicts With Decisions of This Court and With Precedent in Other Circuits	13
II. Certiorari Should Be Granted to Afford Relief to the Union	19
III. This Case Presents Important Issues Which Are Already Before the Court	24
IV. The Standard for Award of Attorney Fees Announced by the Circuit Court Conflicts With Decisions of This Court	25
Conclusion	26
Appendix	1a

TABLE OF AUTHORITIES

Cases Page

Alabama Education Association v. Alabama Professional Staff Org., 655 F.2d 607, 609 (5th Cir., Unit B, 1981) 15

Alexander v. Gardner Denver Co., 415 U.S. 36 (1970) .. 23

Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975) 25

Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962) 21

Baltimore Regional Joint Board v. Webster Clothes, Inc., 596 F.2d 95, 98 (4th Cir. 1979) 16, 17

Barrentine v. Arkansas Freight System, 450 U.S. 728, 67 L. Ed. 2d 641 (1981) 22

Bell Aerospace Co. v. Local 516, 500 F.2d 921, 924 (2d Cir. 1974) 20

Black-Clawson Co. v. Machinists Union, 313 F.2d 179 (2nd Cir., 1962) 23

Boise Cascade v. United Steelworkers, 588 F.2d 127 (5th Cir.), *cert. denied*, 444 U.S. 830, 100 S.Ct. 57 (1979) 10

Brotherhood of Railroad Trainmen v. Central of Ga. Ry., 415 F.2d 403, 412 (5th Cir. 1969), cert. den. 396 U.S. 1008 (1970) 13, 19

Charles Dowd Box Co., Inc. v. Courtney, 368 U.S. 502, 509 (1962) 21

Communications Workers of America v. Western Electric Co., Inc., 558 F.2d 876 (5th Cir. 1977), aff'g 397 F.Supp. 1318 (N.D. Ga. 1975) ..6, 7, 9, 10, 14

Detroit Coil Co. v. Int. Assn. of Machinists, 595 F.2d 575 (6th Cir. 1979) 16

TABLE OF AUTHORITIES (Continued)

Page

Cases (Continued)

Drake Bakeries v. American Bakery and Confectionery Workers, Local 50, 350 U.S. 254 (1962) 21

General Drivers, etc. Union v. Hays & Nicoulin, Inc., 594 F.2d 1093 (6th Cir. 1979) 16

Humphrey v. Moore, 375 U.S. 335 22

IBEW Locals v. New England Telephone & Telegraph Co., 628 F.2d 644, 649 (1st Cir., 1980) 20

Int. Bro. of Fireman & Oilers v. Nestle Co., Inc., 630 F.2d 474 (6th Cir. 1980) 17

Int. Union of Opr. Engineers v. Kerr-McGee Refining Corp., 618 F.2d 657 (10th Cir. 1980) 17

Jackson Purchase, etc., v. IBEW Local 816, 646 F.2d 264, 268 (6th Cir. 1981) 17

Lodge No. 12, etc. v. Cameron Iron Works, 292 F.2d 112, 118 (5th Cir.), cert. den. 368 U.S. 926 (1961) 14

Loveless v. Eastern Air Lines, 181 F.2d 1272, 1278 (11th Cir., 1982) 12, 13

Machinists District No. 145 v. Modern Air Transport, Inc., 495 F.2d 1241, 1244 (5th Cir.), *cert. denied* 419 U.S. 1050 (1974) 10, 13

Machinists Union v. Olin Mathison Chem. Corp., 335 F.Supp. 212 (D.C. Mo. 1971) 17

Milwaukee Typographical Union v. Newspapers, Inc., 639 F.2d 386, 393, 394 (7th Cir. 1981) 17

Mistletoe Express Service v. Motor Expressmen's Union, 443 F.Supp. 1 (D.C. Okla., 1975) aff'd 566 F.2d 692 17

Monongahela Power Co. v. Electrical Workers Union, 556 F.2d 1196 (4th Cir. 1976) 16

TABLE OF AUTHORITIES (Contidued)

Page

Cases (Continued)

NF&M Corp. v. United Steelworkers, 524 F.2d 756 (3rd Cir. 1975) 16

NLRB v. Miranda Fuel Co., 326 F.2d 172 (2nd Cir., 1963) 23

Norfolk & Western Ry. Co. v. Bro. of Ry., etc., Clerks, 657 F.2d 596, 600, 602-3 (4th Cir. 1981) ... 17

Nuest v. Westinghouse Air Brake Co., 313 F.Supp. 1228 (D.C. Ill. 1970) 17

Philadelphia Food Stores Emp. Labor Council v. Retail Clerks Union, 453 F.Supp. 577 (D.C. Pa. 1978) 17

Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965) 22

Safeway Stores v. American Bakery and Confectionery Workers International Union, Local 111, 390 F.2d 79 (5th Cir. 1968) 15, 20

Smith v. Evening News Asso., 371 U.S. 195 (1962) 22

Storer Broadcasting Co. v. Am. Fed. of TV & Radio Artists, 600 F.2d 45 (6th Cir. 1979) 16

Summit Valley Industries v. Carpenters Union, 72 L. Ed. 2d 511, 50 USLW 4560 25

Teamsters Union v. W. Pennsylvania Motor Carriers Asso., 574 F.2d 783 (3rd Cir. 1978) 17

Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 451 (1957) 21

United States Gypsum Co. v. United Steelworkers of America, 384 F.2d 38, 48 (5th Cir. 1967), *cert. den.* 88 S.Ct. 783 15

United States Steelworkers of America v. Amer. Mfg. Co., 363 U.S. 569 (1970) 22

TABLE OF AUTHORITIES (Continued)

Page

Cases (Continued)

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1970) 12

United Steelworkers of America v. United States Gypsum Co., 492 F.2d 713, 731 (5th Cir.), cert. den. 419 U.S. 998 (1974) 13

United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593, 597 (1970) ..... *passim*

W. R. Grace & Co. v. Rubber Workers Union, Local 759, 652 F.2d 1248 (5th Cir., Unit A, 1981), cert. granted No. 81-1314, June 28, 1982 24

Westinghouse Electric Corp. v. IBEW, 561 F.2d 521 (4th Cir. 1977) 17

Wright-Austin Co., v. United Automobile Workers, 422 F.Supp. 1364 (E.D. Mich., 1976) 16

Statute and Rule Involved

29 U.S.C. § 185 ..... 2, 20

FRCP 52(a) 12

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AERONAUTICAL MACHINISTS LODGE
709, IAM&AW, AFL-CIO,
Petitioner,

v.

LOCKHEED-GEORGIA COMPANY,
DIVISION OF LOCKHEED CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Aeronautical Machinists Lodge 709, IAM&AW, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *Aeronautical Machinists Lodge 709, IAM&AW v. Lockheed Georgia Company*, issued as mandate on November 3, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals and the three opinions of the District Court, with one exception, are unpublished.* The three opinions and orders of the Dis-

*The opinion of the District Court entered on September 11, 1981 (App. G) is published at 521 F. Supp. 1327.

trict Court are reprinted in the separate Appendix hereto as Appendices E (1e-6e), G (1g-9g), and H (1h-2h). The opinion of the Court of Appeals is reprinted as Appendix A (1a-12a) in the separate Appendix.

JURISDICTION

The Court of Appeals entered judgment on July 21, 1982. Appendix O (1o-2o). Timely petition for rehearing was denied on September 14, 1982. Appendix L (1l-2l). This Court has jurisdiction to review the judgment below under 28 U.S.C. § 1254 (1).

STATUTES AND RULE INVOLVED

The pertinent parts of Section 301 of the Labor Management Relations Act, as amended, 29 U.S.C. § 185, and of Rule 52(a), F. R. Civ. P. are reprinted in an appendix in the back of this petition.

STATEMENT OF THE CASE

Machinists Lodge 709 brought this action in the Northern District of Georgia to set aside the award of an Arbitrator which it believed to depart from the plain terms of the collective bargaining agreement and which "administered his own brand of industrial justice" contrary to the dictates of this Court in *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1970). The Arbitrator's Award (App. B, 1b-9b) upheld the action of Lockheed which barred a Union Business Representative (R. P. Mason) from access to all Lockheed controlled premises. See Grievance in Appendix P (1p).

The complaint prayed that the award of the Arbitrator

be set aside, that a new arbitration be ordered "or that plaintiff's grievance be upheld by the Court, and for such other relief as may be proper." (Appendix C, 1c, 3c-4c). Lockheed countered with a cross action to enforce the award and for attorney fees (Appendix D, 1d-7d).

The District Court set aside the Arbitration Award and remanded the case to the Arbitrator for further consideration in accordance with its opinion. (Appendix E, 1e-6e).

On remand the Arbitrator reaffirmed his previous decision, contrary to the opinion and instructions of the District Court (Appendix F, 1f-5f). Lodge 709 objected to the Supplemental Award and asked that it be vacated and set aside because the Arbitrator had again failed to uphold the plain terms of the Agreement and had again administered his own brand of industrial justice. In its objections to the Supplemental Award, the Union asked for affirmative relief.

The Court again set aside the Arbitrator's award but failed to grant affirmative relief. (Appendix G, 1g-9g). Lodge 709 then filed a motion that the Court's opinion and order be amended to grant affirmative relief and direct Lockheed to permit access to its premises by Business Representative Mason.

The District Court held that it did not have authority to enforce the provisions of the collective bargaining agreement. (Appendix H, 1h-2h).

Lockheed appealed from the judgment setting aside the Arbitrator's supplemental award and the Union appealed from the denial of affirmative relief.

On appeal the Fifth Circuit reversed the District Court on Lockheed's appeal but affirmed the denial of relief to the Union. (Appendix A, 1a-12a).

STATEMENT OF FACTS

The collective bargaining agreement between Lockheed-Georgia Company and Lodge 709 provides that:

> Section 2—Union Officials and Business Representatives
>
> The President, Vice-President and Business Representatives of the Union shall have access to the Labor Relations Department Office for the purpose of contracting Labor Relations personnel *and shall have access to the departments of the Company's plant to which they are assigned* for the sole purpose of contacting the Union Steward or Committeeman concerning employee complaints or grievances or matters arising out of the application of this Agreement. Such visits shall be subject to such regulations as may be made from time to time by the Company. *The Company shall not impose regulations which will render ineffective the purposes of this Section.* Before entering the Company's plant for the above purpose, the President, Vice-President, or a Business Representative shall notify the Labor Relations Department of the date and time he will be in the plant, and the name of the Union Steward or Committeeman he will contact.
>
> The President, Vice-President or Business Representative shall not discuss any problem with employees (other than the Steward and Committeeman) or with the supervision of any department. (Contract, Part B, Art. II, Sec. 2, emphasis supplied; Appendix Q, 1q-2q).

Business Representative Mason became involved in a dispute with a department manager while on Lockheed premises. Lockheed contended that Mason had assaulted a supervisor in the manager's office, which Mason denied.

Rather than file a grievance that Mason had violated the contract (last paragraph quoted above). Lockheed barred Mason from all access to its premises. Notwith-

standing its vast personnel and security resources, Lockheed took no intermediate action, nor promulgated any intermediate "regulations" but elected to bar Mason altogether from all "Lockheed controlled property."[1]

The Union filed a grievance (App. P) asserting that Lockheed had violated the above quoted provisions by barring Mason altogether from Lockheed premises, thereby preventing him from performing his assigned duties, rather than adopt reasonable intermediate regulations to prevent the alleged, and denied, abuse of management personnel.

The Arbitrator ruled in favor of Lockheed finding an implied "rule of reasonableness" which was "implicit" but was *not* written or stated anywhere in the collective bargaining agreement. (Appendix B, 8b-9b).[2]

---

[1] As found by the District Court (Appendix G, 6g-7g), Union President Reeves Bowen testified in the arbitration proceedings, *without any contradiction*, that: "A sizeable portion of our relationship with the Company is confrontation." [Arb. Transcript, Vol. II, page 102.] "A lot of it is trench warfare." [Arb. Transcript, Vol. II, p. 102. "It's rare that a month goes by without [the Company contacting] me with a claim of misconduct * * * they have a very high rate of complaints on business representatives. * * * they have a stack of paperwork on [Business Representative John Kendrick] * * * about that high (indicating), maybe a foot off the table. * * * Also, they have mentioned that they have a stack of paperwork on [Business Representative] Gerald Brown * * * so high (indicating) * * * six inches off the table. * * * they claim we've made complaints to them about business representatives being bumped around by management people. * * * We've made complaints about abuse, more often the people we represent and the business representatives themselves, of course. * * * I've been threatened more than once with having the guard walk me out." [Arb. Transcript, Vol. II, pp. 100-101].

[2] The Union's grievance was *not* a grievance involving the issue of "proper cause" for discipline which would have given the arbitrator a broad discretion, but was designed to uphold the specific contractual guaranty of plant access for employee representation. See Grievance, Appendix Q.

The collective bargaining agreement, on the other hand, provides explicitly that:

> The Arbitrator *shall not* have the authority to amend or modify this Agreement or to establish new terms and and conditions of this Agreement.

Part B, Article III, Section 5; App. Q, 4q-5q).

In its first opinion, the District Court found and ruled:

> This Court may also consider whether an arbitrator has exceeded the authority conferred upon him by a collective bargaining agreement:
>
> > [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look to guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. *United Steelworkers v. Enterprise Wheel and Car Corp., supra,* at 597.
>
> An arbitrator may not go beyond interpretation and application of the collective bargaining agreement. *Communication Workers v. Western Electric Co., Inc.,* supra.[3]
>
> The issue which the parties presented to the arbitrator was whether the Company violated the collective bargaining agreement by permanently barring Mr. Mason from all Lockheed controlled property. The award and opinion indicate that the arbitrator's concern was whether the Company's bar against Mr. Mason's presence on its property was justified. The

---

[3] *Communications Workers of America v. Western Electric Co., Inc.,* 558 F.2d 876 (5th Cir. 1977), aff'g 397 F.Supp. 1318 (N.D. Ga. 1975).

arbitrator appeared to conclude that if the action was justified it was not a violation of the agreement, and he found that a rule of reasonableness must be used to interpret and apply the provisions of the collective bargaining agreement. His final determination was that the Company's action 'was justified by [Mr. Mason's] misconduct and did not violate the Agreement.'

It appears to this Court that the arbitrator went beyond the issue submitted to him in making his determination. The issue which was before the arbitrator was not whether the Company was justified in barring Mr. Mason from its property. It was instead whether the Company's action rendered ineffective the purposes of the provision of the collective bargaining agreement which allowed Mr. Mason access to property of the Company for the purpose of performing his job as business representative (hereinafter referred to as 'the business representative provision'). If the arbitrator had found that the Company's action did render ineffective the purposes of that provision, he would have been required to conclude that the Company violated the agreement according to its terms, no matter how justified he might have found that violation to be. The parties have agreed that the Company *shall not* render ineffective the purposes of the business representative provision. *See Communication Workers v. Western Electric Co., Inc., supra.*

The arbitrator noted that Mr. Mason's ability to fully perform his job as a business representative has been hampered to some degree by his lack of access to the plant, but this Court feels that the opinion does not focus on whether the Company's action *renders ineffective* the business representative provision in violation of the agreement. Accordingly, this matter is REMANDED to the arbitrator for clarification or for additional findings on that issue.

After "complete review of this matter" on remand, the Arbitrator reiterated his earlier holding notwithstanding the admonitions of the District Court. He said:

> While not explicitly stated in Article II, Section 2 of the Agreement, it is *implicit* in those provisions that the right of access granted to Union Business Representatives is contingent upon their conducting themselves in a manner which is consistent with the purposes for which access has been granted, * * * (emphasis supplied, (Appendix F, 3f).
>
> * * *
>
> As it relates to this matter, the purpose of Article II, Section 2 of the Agreement is to facilitate the Business Representatives' performance of specified duties by allowing them access to the Labor Relations Department Office and their assigned plant department for the performance of specified tasks. *The Company's action rendered the purpose ineffective as to Mason*, as an individual Business Representative, but the general purpose of the provision was not rendered ineffective when Mason was barred since all other Business Representatives continued to have access to the plant. Article II, Section 2 specifically provides that the Company may regulate visits by Business Representatives to the Labor Relations Department Office and their assigned departments and that the 'Company shall not impose regulations which will render ineffective the purpose of this Section.' The 'regulations' provided for refer to rules or restrictions on the manner in which plant visits are to be made. By barring Mason from Company premises, the Company did not regulate *visits* made under Article II, Section 2, but rescinded Mason's *right* to access and the Union's right to have Mason granted access to plant premises, based on the implicit contractual authority which arose from Mason's persistent and outrageous breach of the obligation for proper conduct. Thus, the bar to Mason's entry was not a regulation on plant visits which rendered the purpose of Article II, Section 2 ineffective, and the Company

did not violate Article II, Section 2 by imposing the bar. (Id., 4f-5f, emphasis supplied.)

Upon the Union's Objections to Confirmation of the Arbitrator's Supplemental Opinion, the District Court held:

> However, the courts have fashioned a few exceptions to the finality of arbitration awards. In *Enterprise Wheel, supra,* the Supreme Court stated that the arbitration award 'is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.' 363 U.S. at 597. Thus, a court may consider whether, as this Court did in its Order of June 30, 1980, an arbitrator has exceeded the authority conferred upon him by a collective bargaining agreement. *Western Electric, supra.* In the case at bar, the parties' collective bargaining agreement provides, *inter alia,* that '[t]he arbitrator shall not have the authority to amend or modify [the agreement] or to establish new terms and conditions . . .' Agreement at Art. III, Sec. 5.
>
> On remand, the arbitrator found the Company's bar of Mr. Mason not to have rendered ineffective the purpose of Art. II, Sec. 2 because other business representatives continued to have access to the Company's premises. However, this holding is premised on his earlier determination that the Company did not violate Art. II, Sec. 2 because it was justified in 'rescind[ing] the right to access as it applied to Mason . . . ' Supplemental Award at p. 5. This analysis is in direct contravention of this Court's earlier ruling that '[t]he issue which was before the arbitrator was not whether the Company was justified in barring Mr. Mason from its property.' In other words, the arbitrator should have considered whether Art. II, Sec. 2 gives the Company the right to bar access to its premises to a business representative, without regard to the arguments the Company might put forth to justify its action.

The Court recognizes the Company's legitimate interests in protecting its personnel from physical attacks and its operations from disruptive behavior. However much this Court might sympathize with this feeling [, that the Company's action was justified,] the arbitrator 'does not sit to dispense his own brand of industrial justice.' *Western Electric, supra,* at 1323. His authority was limited to deciding the issues submitted to him. Thus, in considering whether the Company was justified in its action he went beyond his authority and this Court has no choice but to refuse enforcement of the award. *Enterprise Wheel, supra,* at 597; *Western Electric, supra,* at 1323.

The Court notes that Art. II, Sec. 2 gives the Company the authority to make rules to govern the right of access by Union personnel. Therefore, it cannot be said that the Company is left without a remedy. It can adopt regulations to protect its legitimate concerns by providing for lesser sanctions than a bar, thereby also safeguarding the Union's right of access. In this regard, the Court finds the arbitrator's holding that by barring Mr. Mason the Company did not regulate his right of access to the premises to be 'without foundation in reason or fact.' *Machinists District No. 145 v. Modern Air Transport, Inc.*, 495 F.2d 1241, 1244 (5th Cir.), *cert. denied* 419 U.S. 1050 (1974); *Boise Cascade v. United Steelworkers*, 588 F.2d 127 (5th Cir.), *cert. denied*, — U.S. ——, 100 S.Ct. 57 (1979). Common sense dictates that the withdrawal of the right of access is the ultimate regulation of access.

In *Boise Cascade, supra,* at 129-30, the Court held that an arbitrator can consider extrinsic evidence 'to explain an agreement that may rationally be considered ambiguous.' In that case the arbitrator made a finding that the agreement was ambiguous; thus, requiring extrinsic evidence such as the practices of the industry and the shop. *Id.* To the contrary, in this case, the arbitrator made no finding of ambiguity. Therefore, his duty was to interpret the express language of Art.

II, Sec. 2, which states that '[*b*]*usiness* [*r*]*epresentatives* . . . *shall have access* to the' Company's premises, without reliance on extraneous evidence.

Notwithstanding the clear contractual language, the arbitrator held that Mr. Mason 'breached the *implicit* obligation for proper conduct, upon which the right of access . . . is contingent . . . ' Supplemental Award at p. 4. To make this finding, the arbitrator impermissibly added terms which the parties did not place in the contract. Defendant argues this departure by the arbitrator from the plain terms of the contract is the classic 'law of the shop' contractual analysis. However, that argument fails where there has been no finding of ambiguous language on the part of the artitrator. Furthermore, assuming that evidence of prior custom and practice between the parties was admissible, the record shows a stormy relationship and excessive conduct by representatives of both parties, which had been tolerated (albeit with many mutual protestations) by the parties for many years. *See* Transcript of Arbitration Proceeding, Vol. II, at pp. 100-102.

In conclusion, even if the arbitrator were allowed to consider extraneous evidence, the custom and practice of the plant and the law of the shop did not show a regular practice of ousting business representatives from the premises for excessive behavior. To the contrary, it showed toleration and even condonation of excessive behavior by both parties over the years. (Appendix G, 4g-7g).[4]

* * *

---

[4] Irrespective of whether an ambiguity must exist in a contract before the "law of the shop" may be considered by an arbitrator, the arbitrator in this case *did not* rely upon the "law of the shop" in making his decisions and the District Court expressly and properly so found. As the District Court found, the only relevant evidence of custom and practice at Lockheed shown in the evidence before the arbitrator was evidence of a long history of condonation of excessive conduct by both parties and there was no evidence that there was a

> . . . In the case at bar, the language in Art. II, Sec. 2 makes it clear business representatives shall have access and that any regulations are not to defeat this right of access. Given the absence of any regulations prior to this action, the arbitrator could not *ex post facto* imply such a regulation which clearly defeats the right of access. A proper regulation might provide for a lesser sanction than a total bar of Mr. Mason in this case. (App. G, 7g-8g).

The District Court therefore vacated the Arbitrator's awards (App. G, 9g); but the Court denied the express request of the Union for a court order enforcing the clear terms of the agreement on the basis that the Court did not have authority to enforce the Agreement and grant affirmative relief. (App. H, 1h-2h).

The Court of Appeals reversed the order vacating the awards but affirmed the denial of affirmative relief. (App. A, 11a-12a).[5]

---

regular practice of ousting Business Representatives from the premises. This Court has defined the "law of the shop" as the customs and practices of the parties under the contract. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579-582 (1970). Custom and practice which reveals the "law of the shop" must be shown in evidence before it can be devined or found to exist by an arbitrator. The District Court properly so held, and the ruling of the Court of Appeals (App. A, 8a-9a) that the arbitrator may devine "the law of the shop" out of the ether without evidence upon which to base a finding of "law of the shop" (here non-existent) grants unlimited authorization to arbitrators to *make* contracts which differ from the agreement written by the parties. In the long term such can only result in undermining confidence in the arbitration process. This ruling of the Circuit Court in improperly reversing the findings of the District Court defies the spirit, if not the letter, of FRCP 52(a).

[5] In *Loveless v. Eastern Air Lines*, 681 F.2d 1272, 1278 (11th Cir., 1982), another panel of the Eleventh Circuit cited the District Court's September 11, 1981, decision in this case with apparent approval, recognizing that where the collective bargaining agreement prohibits an arbitrator from amending, modifying or adding new terms or conditions to the agreement, as here, the authority of the arbitrator is

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With Decisions of This Court and With Precedent in Other Circuits.

In *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), this Court held:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look to guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to his obligation, courts have no choice but to refuse enforcement of the award. (363 U.S. at 597.)

The Fifth Circuit has consistently recognized the limitations upon an arbitrator's authority, even in those cases in which it has enforced an award which had been rendered pursuant to a broad arbitration clause containing no restrictions upon the arbitrator's authority. See, e.g., *Machinists District No. 145 v. Modern Air Transp., Inc.*, 495 F.2d 1241, 1244 (5th Cir.), cert. den. 419 U.S. 1052 (1974); *United Steelworkers of America v. United States Gypsum Co.*, 492 F.2d 713, 731 (5th Cir.), cert. den. 419 U.S. 998 (1974). And in *Brotherhood of Railroad Trainmen v. Central of Ga. Ry.*, 415 F.2d 403, 412 (5th Cir. 1969), cert. den. 396 U.S. 1008 (1970), the Fifth Circuit restated the limitations upon an arbitrator's power, as follows:

> The arbitrator's role is to carry out the aims of the agreement, and his role defines the scope of his au-

---

limited to the interpretation and application of the agreement as written by the parties. The decision of the Eleventh Circuit panel in this case, rendered per curiam, without oral argument and unpublished, disregards the distinctions as to the authority of an arbitrator which were carefully drawn in the *Loveless* decision.

thority. When he is no longer carrying out the agreement or when his position cannot be considered in anyway rational, he has exceeded his jurisdiction. 415 F.2d, at 412.

See also *Lodge No. 12, etc., v. Cameron Iron Works*, 292 F.2d 112, 118 (5th Cir.), cert. den. 368 U.S. 926 (1961), where the Court said: 'Of course this does not turn the arbiter loose.'

While there have been many decisions in other circuits finding a disregard of their obligation by arbitrators (some of which are cited *infra*), the first of such cases in the Fifth Circuit was decided in 1977, and, as it happens, counsel for Lockheed in this case were the attorneys who there asserted that the arbitrator had demonstrated an infidelity to the agreement of the parties.

In that case, *Communications Workers of America v. Western Electric Co., Inc.*, 558 F.2d 816 (5th Cir. 1977), the Court said: "The district court's decision not to enforce the arbitrator's award was correct, for the reasons set forth in the Order Directing that Judgment Be Entered For the Defendant, published at 397 F.Supp. 1318."

In that Order, Judge James Hill, now of the Eleventh Circuit, said:

> The Court must then look to the words of the arbitrator and determine if his award 'draws its essence from the collective bargaining agreement.' *Enterprise Corp., supra*, at 597.
>
> * * *
>
> However, the Court is of the opinion that the manifest words of the arbitrator clearly show that he did not confine himself to interpretation and application of the collective bargaining agreement, but instead took it upon himself to dispense his own brand of

> industrial justice. Therefore, the enforcement of the award must be denied.
>
> * * * Where the provisions of a collective bargaining agreement are not in clear, plain, exact and unambiguous terms, an arbitrator has wide latitude in interpreting the agreement. [Citations omitted.] However, in the instant case the provisions of the agreement could hardly be more clear.

Similarly, in *Alabama Education Association v. Alabama Professional Staff Org.*, 655 F.2d 607, 609 (5th Cir., Unit B, 1981), the Court said:

> On its face the award should ordinarily reveal that it finds its source in the contract and those circumstances out of which comes the 'common law of the shop.' *Safeway Stores v. American Bakery and Confectionery Workers International Union, Local 111, supra.*[6]

And as Chief Judge Brown said in *United States Gypsum Co. v. United Steelworkers of America*, 384 F.2d 38, 48 (5th Cir. 1967), *cert. den.* 88 S.Ct. 783:

> * * * these * * * are matters which may be controlled, fully or in part, in the Court review of any enforcement proceedings especially as to the extent to which the award grants * * * relief of a kind possibly involving illegal recognition.

Thus the Fifth Circuit, and the Eleventh Circuit until now, have recognized that federal courts have the power *and responsibility* under Section 301 to review arbitration awards to assure that the arbitrator is faithful to his obligation and that his award complies with the agreement of the parties.

The other circuit courts and district courts in many, many cases have also held that an arbitrator exhibits an

---

[6] 390 F.2d 79 (5th Cir. 1968).

infidelity to his obligation if he departs from the plain language of the contract between the parties. For example, in *Monongahela Power Co. v. Electrical Workers Union*, 556 F.2d 1196 (4th Cir. 1976), the contract provided that "the Company shall have the unqualified right to discharge or discipline any or all employees who engage in [a breach of the no-strike clause]." The contract there, *as here*, also provided that the arbitrator "shall have no authority to add to, detract from or alter its express terms." 566 F.2d at 1198. The court held that the arbitrator, having found that the employees violated the no-strike clause, had no authority to vary the action of the company in disciplining them.

Similarly, in *Wright-Austin Co. v. United Automobile Workers*, 422 F.Supp. 1364 (E.D. Mich., 1976), where the contract provided that an employee who was absent three days without notifying the employer would lose his seniority, the court held that the arbitrator could not, after finding a three day absence without notice, restore the employee's seniority.

Likewise, in *General Drivers, etc. Union v. Hays & Nicoulin, Inc.*, 594 F.2d 1093 (6th Cir. 1979), the court held that where the contract provided that the company should be the sole judge of the qualifications of an employee, the arbitrator could not substitute his judgment as to qualifications for that of the company.

The cases which hold that an arbitrator cannot ignore the plain language of a contract and administer his own brand of justice are legion.[7]

---

[7] *Detroit Coil Co. v. Int. Assn. of Machinists*, 595 F.2d 575 (6th Cir. 1979); *NF&M Corp. v. United Steelworkers*, 524 F.2d 756 (3rd Cir. 1975); *Storer Broadcasting Co. v. Am. Fed. of TV & Radio Artists*, 600 F.2d 45 (6th Cir. 1979); *Baltimore Regional Joint Board v. Web-*

The decisions cited in footnote 7 all hold that where the parties *have agreed* to clear language, the arbitrator must make the parties *live up to their bargain*, even though he may think another result would be more fair or may think that the facts provide cause for one of the parties to try to avoid observance of the contractual language. An award which fails to do so does not draw its essence from the agreement of the parties.

In the contract between Lodge 709 and Lockheed, Article II, Section 2, (App. Q, 1q-2q).

> * * Business Representatives of the Union *shall* have access to the Labor Relations Department Office for the purpose of contacting Labor Relations personnel and *shall* have access to the departments of the Company's plant to which they are assigned for the purpose of contacting the Union Steward or Committeeman concerning employee complaints or grievances or matters arising out of the application of this Agreement. Such visits shall be subject to such regulations as may be made from time to time by the Company. *The Company shall not impose regulations which will render ineffective the purposes of this Section.* Before entering the Company's plant for the

---

ster Clothes, Inc., 596 F.2d 95, 98 (4th Cir. 1979); *Westinghouse Electric Corp. v. IBEW*, 561 F.2d 521 (4th Cir., 1977); *Int. Union of Opr. Engineers v. Kerr-McGee Refining Corp.*, 618 F.2d 657 (10th Cir. 1980); *Norfolk & Western Ry. Co. v. Bro. of Ry., etc., Clerks*, 657 F.2d 596, 600, 602-3 (4th Cir. 1981); *Jackson Purchase, etc., v. IBEW Local 816*, 646 F.2d 264, 268 (6th Cir. 1981); *Teamsters Union v. W. Pennsylvania Motor Carriers Asso.*, 574 F.2d 783 (3rd Cir. 1978); *Milwaukee Typographical Union v. Newspapers, Inc.*, 639 F.2d 386, 393, 394 (7th Cir. 1981); *Int. Bro. of Fireman & Oilers v. Nestle Co., Inc.*, 630 F.2d 474 (6th Cir. 1980); *Mistletoe Express Service v. Motor Expressmen's Union*, 443 F.Supp. 1 (D.C. Okla., 1975) aff'd 566 F.2d 692; *Machinists Union v. Olin Mathison Chem. Corp.*, 335 F.Supp. 212 (D.C. Mo. 1971); *Philadelphia Food Stores Emp. Labor Council v. Retail Clerks Union*, 453 F.Supp. 577 (D.C. Pa. 1978); *Nuest v. Westinghouse Air Brake Co.*, 313 F.Supp. 1228 (D.C. Ill. 1970).

> above purpose, the * * * Business Representative *shall* notify the Labor Relations Department of the date and time he will be in the plant, and the name of the Union Steward or Committeeman he will contact. (Emphasis supplied).[8]

The contract also provides in Article III, Section 5. (App. Q, 5q).

> * * * The arbitrator *shall not have the authority to amend or modify this Agreement or to establish new terms and conditions* of this Agreement. (Emphasis supplied.)

Arbitrator Williams found, as a matter of fact, that Business Representative Mason's "ability to fully perform his job as a Business Representative has been hampered to some degree by his lack of access to the plant." (App. B, 8b; also App. F, 4f: "The Company's action rendered the purpose ineffective as to Mason.")

However, notwithstanding the positive dictates and plain language of Article II, Section 2, that Company regulations "shall *not*" "render ineffective" the *guarantee* of access to the plant, the Arbitrator found that the Company did not violate the agreement.

In so doing the Arbitrator modified the plain language of the agreement and administered his own brand of industrial justice; and thereby he demonstrated infidelity to his obligation and vitiated his opinion and award.

The decisions of the District Court setting aside the original award and the supplemental award were therefore in accord with the great body of decisional law, and the Eleventh Circuit's decision reversing the District Court was error.

---

[8] Advance notice of the visit provides Lockheed with ample opportunity to supervise the visit without prohibiting it.

II. Certiorari Should Be Granted to Afford Relief to the Union.

The District Court twice, *and correctly*, set aside the arbitration awards which barred Business Representative Mason from access to Lockheed premises. The Union specifically requested the Court to order Lockheed to adhere to the contract and order Lockheed to reissue identification credentials to Mason which would permit him to enter plant premises and carry out his assigned duties. The Court held that he did not have authority to issue an affirmative award. (Appendix H, 1h-2h). That was error.

This case is similar to that presented in *Brotherhood of Railroad Trainmen v. Central of Georgia Ry. Co.*, 415 F.2d 403 (5th Cir. 1969), *cert. den.* 396 U.S. 1008 (1970). There while the Fifth Circuit noted that the scope of review of an arbitration award "is much narrower than the 'substantial evidence' test affords," it is nevertheless reviewable and is "final and binding" only if it meets the test of judicial review. 415 F.2d, at 411, 412.

There the Court held:

> In the arbitration context, an award 'without foundation in reason or fact' is equated with an award that exceeds the authority or jurisdiction of the arbitrating body. To merit judicial enforcement, an award must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement. The arbitrator's role is to carry out the aims of the agreement, and his role defines the scope of his authority. When he is no longer carrying out the agreement or when his position cannot be considered in any way rational, he has exceeded his jurisdiction. The requirement that the result of arbitration have 'foundation in reason or fact' means that the award must,

> in some logical way, be derived from the wording or purpose of the contract. This Court in Safeway Stores v. American Bakery Workers Local 111, 5 Cir. 1968, 390 F.2d 79, 81, 82, has recently announced the standard for review of an arbitrator's reward: '[I]f the award is arbitrary, capricious or not adequately grounded in the basic collective bargaining contract, it will not be enforced by the courts.' * * * On its face the award should ordinarily reveal that it finds its source in the contract and those circumstances out of which comes the 'common law of the shop.' 415 F.2d, at 411, 412.

As the First Circuit said in *IBEW Locals v. New England Telephone & Telegraph Co.*, 628 F.2d 644, 649 (1980):

> To require the Union to invoke the 'time-consuming and burdensome grievance process again' in order that the parties might resolve the remnants of a dispute which has already once traveled that route would seriously undermine the chief policies underlying resort to those procedures in the first instance: the speedy, flexible and inexpensive resolution of labor disputes. *Interpace Corp., supra*, 447 F.Supp. at 392. 'The purpose of arbitration is to resolve disputes, not to create new ones.' *Bell Aerospace Co. v. Local 516*, 500 F.2d 921, 924 (2d Cir. 1974).

The Union has been left without a remedy by the District Court; and resort to arbitration for a third time is not a proper remedy when the federal courts have the primary power *and* responsibility to interpret and enforce labor agreements.

In Section 301 of the Labor Management Relations Act [29 U.S.C., Sec. 185] Congress provided that:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the

> amount in controversy of without regard to the citizenship of the parties.

This provision "authorizes the federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance . . . [of promises contained in such agreements]." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 451 (1957).

Congress thus gave the basic and primary jurisdiction to enforce collective bargaining agreements to the federal courts. That jurisdiction is *as broad as the promises contained in the collective bargaining agreement.* This Court has said:

> The Labor Management Relations Act of 1947 represented a far-reaching and many-faceted legislative effort to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process. It was recognized from the outset that such an effort would be purposeless unless both parties to a collective bargaining agreement could have reasonable assurance that the contract they had negotiated would be honored. Section 301(a) reflects congressional recognition of the vital importance of assuring the enforceability of such agreements.

Charles Dowd Box Co., Inc. v. Courtney, 368 U.S. 502, 509 (1962).

The authority exercised by the Courts has been varied, *but it is not limited.* Arbitration agreements have been enforced [see, e.g., *Drake Bakeries v. American Bakery and Confectionery Workers, Local 50*, 350 U.S. 254 (1962)]; and orders to arbitrate have been denied because it is the basic duty of the courts to enforce the provisions of collective bargaining agreements. (See, e.g., *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962)]. The authority

of the courts is governed by the agreement of the parties and the parties are free to make their promises "as broad or as narrow as they wish". *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 569, separate concurring opinions, at 363 U.S. 570 (1960).

By virtue of Section 301, courts have jurisdiction to adjudicate breaches of contract *even though* the breach of contract is also an unfair labor practice over which the National Labor Relations Board has jurisdiction. *Smith v. Evening News Association*, 371 U.S. 195, 197 (1962). "The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining agreement is not displaced by § 301, but *it is not* exclusive and does not destroy the jurisdiction of the courts in suits under §301."

While the Supreme Court has held that federal law favors arbitration and that agreements to arbitrate must be exhausted prior to resort to the courts [*Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965)], that is a judicial (not statutory) rule for the administration of the law and *does not oust* the courts of their primary jurisdiction and authority. For example, if a union refuses to arbitrate a case, a judicial remedy for breach of contract is available *without exhaustion* of the contractual procedure. *Republic Steel v. Maddox, supra*, 379 U.S. at 652; *Humphrey v. Moore*, 375 U.S. 335; *Smith v. Evening News Association, supra*. The primary jurisdiction of the courts is not ousted by the availability *or use* of arbitration. *Barrentine v. Arkansas Freight System*, 450 U.S. 728, 67 L. Ed. 2d 641 (1981).

The Labor Board has authority to disregard arbitration decisions and award affirmative relief. Why not the courts? The answer is obvious. Courts have jurisdiction to

overrule Labor Board decisions, as well as arbitration decisions, because Congress has given them that power *and that responsibility. Alexander v. Gardner Denver Co.*, 415 U.S. 36, 60 (1970).

As the Second Circuit said in *NLRB v. Miranda Fuel Co.*, 326 F.2d 172, at 176 and 177:

> In any event, such matters of policy must be settled and determined by the Congress. In this case our task is not to fix policy but to interpret the statute and say what we think the Congress intended it to mean. 326 F.2d, at 176.
>
> Were we to support the doctrine thus propounded the power and jurisdiction of the Board would be vastly extended and increased; and it would seem that such jurisdiction would be primary and the courts would be entirely excluded from the adjudication of such cases. That is what makes the case so interesting and important. 326 F.2d, at 177.

Similarly, if the Courts cannot enforce collective bargaining agreements, the jurisdiction given them by Congress is denied.

As was held in *Black-Clawson Co. v. Machinists Union*, 313 F.2d 179 (2nd Cir., 1962),

> By far the great majority of courts, however, read section 301(a) more expansively and permit suits for a declaration of rights in circumstances such as those in the case before us.

After the Union has twice resorted to arbitration and after the District Court has twice properly set aside the arbitrator's awards, there is no legal limitation or logical reason why the Court cannot enforce the contract in accordance with its clear terms and grant the Union the remedy sought in its grievance and in this action. To deny such relief denies the authority granted to federal courts in Section 301.

III. This Case Presents Important Issues Which Are Already Before the Court.

This case presents the same questions as are presented in reverse in *W. R. Grace & Co. v. Rubber Workers Union Local 759*, 652 F.2d 1248 (5th Cir., Unit A, 1981, certiorari granted, No. 81-1314, June 28, 1982.)

In that case the Fifth Circuit held, as did the District Court here, that where a contract provides that an arbitrator "shall have no authority to add to, adjust, change or modify any provisions" of the agreement between the parties, *it means just that* and it is the function of federal courts to enforce the agreement as the parties wrote it. There the first arbitrator ignored the plain terms of the seniority provisions of an agreement and held that, because of a district court decision in a Title VII case, *subsequently reversed by the Fifth Circuit*, it would be inequitable to require the employer to live up to the terms of the agreement and pay back pay to displaced employees. A second arbitrator disagreed. The Fifth Circuit held that *its decision had become the law of the contract and must be followed by the arbitrator* (652 F.2d, at 1254, 1255). Here as in that case, "There is nothing in the contract about the arbitrator balancing the equities or deciding whether something is unfair or not." Here, as in that case, the decision of the arbitrator "departed from the terms of the contract." 652 F.2d at 1255, 1257. Here the District Court in its first decision, acting within its authority, held that the arbitrator had not been faithful to his obligation and it was proper for the Court to set aside the second award which continued to ignore the plain terms of the contract.

This case should in the interest of uniformity of decision be reviewed concurrently with the *Grace* case.

IV. The Standard for Award of Attorney Fees Announced by the Circuit Court Conflicts With Decisions of This Court.

The Eleventh Circuit held that attorney fees may be awarded against the Union if the District Court finds that the Union refused to abide by the arbitrator's award "without justification." That standard is improper and should be corrected. The Union has abided by the arbitrator's awards while challenging their propriety by legal action.

In *Summit Valley Industries v. Carpenters Local Union 112*, 50 U.S.L.W. 4560 (#81-497, 6/1/82), this Court said:

> Under the American Rule it is well-established that attorney's fees "are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." *Fleischman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967). This Court has endorsed certain exceptions to this rule where necessary to further the interests of justice. See, *e.g.*, *Vaughan v. Atkinson*, 396 U.S. 527 (1962) (bad faith); *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923) (willful disobediance of a court order); *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885) (common fund). In the absence of one of these equitable exceptions, however, the rule has been consistently followed for almost 200 years. See *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 249-250 (1975); *Arcambel v. Wiseman*, 3 Dall. 306 (1796).

* * *

> As we have often noted, one of the primary justifications for the American Rule is that "one should not be penalized for merely defending or prosecuting a lawsuit." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967) (emphasis added). See also, *F. D. Rich Co. v. United States ex rel Industrial Lumber Co.*, 417 U.S. 116, 129 (1974); *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 235 (1964).

50 U.S.L.W. at 4561 (emphasis by the Court).

The standard of "without justification" established by the Eleventh Circuit is broader than "bad faith", and is therefore improper unless those terms are equated by judicial explanation.

Furthermore, the Union has complied with the arbitrator's decision. Representative Mason has not been on Lockheed premises since he was barred by Lockheed on May 3, 1977. All the Union has done is to litigate the propriety of the arbitrator's decision. Under the American Rule, the Union is entitled to do that without liability for attorney fees.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

J. R. GOLDTHWAITE, JR.
Counsel of Record

ADAIR & GOLDTHWAITE, P.C.
777 West Peachtree Street, N.E.
Atlanta, Georgia 30308

APPENDIX

Statute and Rule Involved

Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C., § 185 provides as follows:

§ 185. Suits by and against labor organizations

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity

as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.

Rule 52 (a), F.R.Civ.P., provides in pertinent part:

. . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . .

82-969

No. _____

Office-Supreme Court, U.S.
F I L E D
DEC 9 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AERONAUTICAL MACHINISTS LODGE 709,
I.A.M. & A.W., AFL-CIO,
Petitioner,

v.

LOCKHEED GEORGIA COMPANY, DIVISION
OF LOCKHEED CORPORATION,
Respondent.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

J. R. GOLDTHWAITE, JR.
Counsel of Record

ADAIR & GOLDTHWAITE, P.C.
777 West Peachtree St., N.E.
Atlanta, Georgia 30308

CONTENTS

	Page
Appendix A—Decision Below, July 21, 1982 (Unpublished)	1a
Appendix B—Arbitrator's Opinion and Award, March 27, 1979	1b
Appendix C—Complaint, June 22, 1979	1c
Appendix D—Answer & Counterclaim, July 17, 1979	1d
Appendix E—District Court Order, June 30, 1980	1e
Appendix F—Arbitrator's Supplemental Opinion and Award, March 4, 1981	1f
Appendix G—District Court Order, September 11, 1981	1g
Appendix H—District Court Order, October 6, 1981	1h
Appendix I—Petition for Rehearing	1i
Appendix J—Request for Recusal of Judge	1j
Appendix K—Order Striking Motion for Recusal of Judge	1k
Appendix L—Order Denying Rehearing filed September 14, 1982	1l
Appendix M—Motion to Stay Mandate	1m
Appendix N—Order Denying Stay of Mandate	1n
Appendix O—Judgment of Court of Appeals, issued November 3, 1982	1o
Appendix P—The Grievance	1p
Appendix Q—Contractual Provisions: Contract, Part B:	
Article I, Section 4	1q
Article I, Section 8	1q
Article II, Section 2	1q
Article III, Section 2	2q
Article III, Section 5	3q

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NOS. 81-7772
81-7918 [DO NOT PUBLISH]

Non-Argument Calendar*

AERONAUTICAL MACHINISTS LODGE 709,
IAM & AW, AFL-CIO,
Plaintiff-Appellee,

versus

LOCKHEED-GEORGIA COMPANY,
Division of LOCKHEED CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

---

(July 21, 1982)

BEFORE TJOFLAT, FAY and HENDERSON, Circuit Judges.

PER CURIAM:

Following a dispute [1] between the Union representative and Company officials, the Company barred the Union representative from its facilities. The matter resulted in arbitration pursuant to the collective bargaining agreement. The arbitrator twice ruled in favor of the Company and the district court twice overruled the arbi-

---

*Fed. R. App. P. 34(a); 11th Cir. R. 23.

[1] The arbitrator found this to be an improper physical assault upon management personnel.

trator's action. The matter comes to us for review of the summary judgment entered by the district court in favor of the Union. The Company also asks for attorneys' fees. We reverse summary judgment and reinstate the arbitrator's decisions with instructions.

Article II, Section 2, of the collective bargaining agreement provides in part:

> The President, Vice-President and Business Representatives of the Union *shall have access to the Labor Relations Department Office* for the purpose of contacting Labor Relations personnel and *shall have access to the departments of the Company's plant* to which they are assigned for the sole purpose of contacting the Union Steward or Committeeman concerning employee complaints or grievances or matters arising out of the application of this Agreement. Such visits shall be subject to such regulations as may be made from time to time by the Company. The Company shall not impose regulations which will render ineffective the purpose of this Section.

(R. 3, 159 [Art. II, Sec. 2]) (emphasis added).

The parties referred the grievance to arbitration based on separate submission statements. (R.2, 14; R.3, 161-63). Under the arbitration provision of the agreement, in the absence of a joint submission, "the *arbitrator* shall determine the issue or issues to be heard, provided that said issue or issues are arbitrable in accordance with this Section." (R.3, 159 [Art. III, Sec. 5]) (emphasis added). Both parties stipulated that the matter was arbitrable. The arbitrator determined that the issue presented for resolution was "whether or not the Company violated the Agreement by permanently barring Business Representative R. P. Mason from all Company-Controlled property on May 3, 1977." (R.2, 14).

After receiving evidence, the arbitrator concluded that

the Company's decision to bar Mason from its premises did not violate the agreement. In interpreting the agreement, the arbitrator applied a "rule of reasonableness" to conclude that

> [i]mplicit in those [access] provisions is the requirement that Business Representatives conduct themselves in a manner consistent with commonly accepted behavior in their adversary relationship with management personnel. The right to access to Company facilities may properly be denied an individual who commits physical violence toward others, activity which is clearly beyond the limit of acceptable behavior. A Business Representative who exercises his right of access by physically abusing management personnel may properly be denied that right . . . . [Mason's] conduct while in the Company's plant amounted to an abuse of his right to have access to the plant. The Company's action in permanently barring [Mason] from the plant was justified by his misconduct and did not violate the Agreement.

Id., 17-18.

After the issuance of the award, the Union initiated a complaint in federal district court seeking to vacate the award. *Id.*, 4-6. Subsequently, the parties filed cross-motions for summary judgment. *Id.*, 40-99, 100-43. The district court remanded the case to the arbitrator because it concluded that the arbitrator had gone beyond the issue submitted to him in making his determination. The court found that the issue before the arbitrator did not concern whether the Company's action was justified, but was instead "whether the Company's action rendered ineffective the purposes of the provision of the collective bargaining agreement which allowed Mr. Mason access to property of the Company for the purpose of performing his job as business representative. . . . (R.1, 210-11).

The district court further stated that if the Company's action rendered the access provision ineffective, the arbitrator "would have been required to conclude that the Company violated the agreement according to its terms, no matter how justified he might have found that violation to be." *Id.*, 211.

On remand, the arbitrator issued a supplemental opinion and award addressing the issue for arbitration as redefined by the district court. *Id.*, 314. The arbitrator again resolved the dispute in favor of the Company. In clarifying the basis for the original award, he reasoned that "seemingly unrestricted rights" granted in a collective bargaining agreement may include implicit restrictions and obligations. The arbitrator found that implicit in the right of access is the restriction that Union representatives conduct themselves "in a manner . . . consistent with the purposes for which access has been granted" and the obligation "to refrain from engaging in activity which exceeds the limits of acceptable conduct." *Id.* The arbitrator then concluded that Mason's breach of his obligation of proper conduct operated as a waiver and forfeiture of his corresponding right to have access to the Company's plant and gave the Company the authority to rescind Mason's right of access without committing a violation of the agreement. *Id.*

In addition, the arbitrator offered two other grounds for his decision: (1) the Company's denial of access did not render the access provision ineffective because all other Union representatives continued to have access to the premises; and (2) the denial of access was not a regulation which could render the access provision ineffective because "regulations" within the meaning of that provision concern only the manner in which plant visits

are made, not the right to access itself. *Id.*

After issuance of the supplemental award, the matter was returned to the district court for action on the parties' outstanding motions for summary judgment. The district court rejected the arbitrator's resolution of the issue concluding that the arbitrator's analysis was "in direct contravention of this Court's earlier ruling" because it was premised on his original determination that the Company's action was justified and, therefore, not in violation of the agreement. *Id.*, 356. Finding that the arbitrator had exceeded his authority, the district court then interpreted the access provision to require the arbitrator to decide whether the Company could bar a particular Union representative from its premises "without regard to the arguments the Company might put forth to justify its action." *Id.*, 357. The court further concluded that the arbitrator's analysis, which construed the right of access as contingent upon an obligation to refrain from violence, "impermissibly added terms which the parties did not place in the contract." *Id.*, 358. In support of this conclusion, the district court noted that the arbitrator's failure to find any ambiguity in the contractual language precluded him from relying on the "law of the shop." *Id.* The district court then conducted an analysis of the record and found that if the arbitrator had been permitted to consult the law of the shop, the custom and practice of the Company "did not show a regular practice of ousting business representatives from the premises for excessive behavior. To the contrary, it showed toleration and even condonation of excessive behavior by both parties over the years." *Id.*, 358-59. The court granted the Union's motion for summary judgment and entered judgment accordingly. *Id.*, 369-70, 373.

The Union then moved the court to amend its judgment to require the Company to permit Mason to have access to the premises and to issue Mason the necessary credentials to permit such access. *Id.*, 362-63. The district court denied the motion to amend because the affirmative relief sought would be a decision on the merits and, thus, beyond the court's jurisdiction. (1st Sup. R. 16-17). Notices of appeal were timely filed. (R.1, 371, 373; 1st Sup. R. 22).

The scope of review of an arbitrator's award is extremely limited. "When the question of arbitrability is resolved in favor of arbitration, our only remaining function is to determine whether the award draws its 'essence' from the collective bargaining agreement. . . ." International Association of Machinists & Aerospace Workers v. Texas Steel Co., 538 F.2d 1116, 1120-21 (5th Cir. 1976), *cert. denied*, 429 U.S. 1095 (1977); Amalgamated Meat Cutters & Butcher Workmen v. Neuhoff Bros. Packers, Inc., 481 F.2d 817, 819 (5th Cir. 1973). The Company contends that the arbitrator's original award drew its essence from the agreement and, therefore, should have been enforced. The Company also contends that the arbitrator did not exceed his authority in making the original award.

The arbitrator is

> confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597, 80 S.Ct. 1358,1361, 4 L.Ed.2d 1424 (1960). The former Fifth Circuit interpreted this limitation in terms of "foundation in reason or fact":

> "[A]n award 'without foundation in reason or fact' is equated with an award that exceeds the authority or jurisdiction on the arbitrating body. To merit judicial enforcement, an award must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement. The arbitrator's role is to carry out the aims of the agreement, and his role defines the scope of his authority. When he is no longer carrying out the agreement or when his position cannot be considered in any way rational, he has exceeded his jurisdiction. The requirement that the result of arbitration have 'foundation in reason or fact' means that the award must, in some logical way, be derived from the wording or purpose of the contract."

International Association of Machinists & Aerospace Workers v. Modern Air Transport, Inc., 495 F.2d 1241, 1244 (5th Cir.), *cert. denied*, 419 U.S. 1050 (1974) (quoting Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co., 415 F.2d 403, 411-12 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008 (1970).

"[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. *Enterprise Wheel*, 363 U.S. at 599, 80 S.Ct. at 1362; *quoted in* Waverly Mineral Products Co. v. United Steelworkers, 633 F.2d 682, 684 (5th Cir. 1980). The arbitrator's source of law for interpreting the agreement is not confined to the express provisions of the contract because the practices of the industry and the shop are "equally a part of the collective bargaining agreement although not expressed in it." United Steelworkers v. Warrior & Gulf

Navigation Co., 363 U.S. 574, 581-82, 80 S.Ct. 1347, 1352, 4 L.Ed.2d 1409 (1960).

A reading of the arbitrator's original award reveals that it was based on an interpretation of the collective bargaining agreement together with the law of the shop. His analysis and reasoning with regard to the implicit obligation of a business representative to conduct himself in a manner consistent with commonly accepted behavior cannot be said to be without foundation in reason or fact. The rule of reasonableness which the arbitrator applied was found in the law of the shop and could be used to interpret the access provision unless the agreement " 'stated a contrary rule in plain words.' " *Warrior & Gulf*, 363 U.S. at 580, 80 S.Ct. at 1351 (quoting Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1498-99 (1959)). Because there is no provision in the arbitration section of the agreement prohibiting the use of the "law of the shop" in interpreting the agreement, the arbitrator's words cannot be said to "manifest an infidelity" to his obligation to interpret the agreement without dispensing "his own brand of industrial justice." (R.3, 159 [Art. III, Sec. 5]); *Enterprise Wheel*, 363 U.S. at 597, 80 S.Ct. at 1361. The arbitrator's original award drew its essence from the collective bargaining agreement and the arbitrator in reading the agreement did not exceed his authority by applying the law of the shop.

As noted, the court's sole function on review of the arbitration award was to determine whether the award drew its essence from the collective bargaining agreement. The Company contends that the district court exceeded its permitted scope of review by (1) redefining the issue presented for resolution and (2) reviewing the merits of the case.

The district court, in reviewing the award, determined that the arbitrator's application of a rule of reasonableness to conclude that the Company's action was justified and, therefore, not a violation of the agreement, exceeded the scope of the issue presented to him. The court then undertook to redefine the issue to focus on whether the action barring Mason from the premises rendered the access provision ineffective, rather than whether the action violated the agreement. (R.1, 210-11). This act of redefinition clearly encroached on the arbitrator's express authority to define the issue for resolution in the absence of a joint submission. (R.3, 159 [Art. III, Sec. 5]).

The district court's conclusion that the arbitrator exceeded the scope of the issue submitted for arbitration was also improper because the court engaged in an examination of the merits and substituted its judgment for that of the arbitrator. The arbitrator's analysis of the merits revolved around an implicit obligation on the part of business representatives to refrain from physical violence. The arbitrator found that, under the rule of reasonableness, the Company's action was justified and that, in light of such justification, the agreement was not violated. The district court, however, found this line of reasoning to be unacceptable and directed the arbitrator to conduct his analysis on remand without reference to justifications for the action. (R.1, 211). The question of construction of a collective bargaining agreement is one for the *arbitrator*. Insofar as the arbitrator's decision concerns construction of the agreement, "the courts have no business overruling him because their interpretation of the contract is different from his." *Enterprise Wheel*, 363 U.S. at 599, 80 S.Ct. at 1362, *quoted in Waverly Mineral*, 633 F.2d at 684. If the arbitration award on its face is

grounded in the agreement and the law of the shop, the courts may not " 'assay the legal correctness of the reasoning pursued . . . .' " United Steelworkers v. U.S. Gypsum Co., 492 F.2d 713, 733 (5th Cir.), *cert. denied*, 419 U.S. 998 (1974). Here, the arbitration award was based on a construction of the access provision and the law of the shop; the district court exceeded its authority on review when it supplanted the arbitrator's reasoning with its own and attempted to direct the arbitrator's analysis on remand.

The Company contends that the district court erred in remanding the case to the arbitrator for additional findings on the issue of whether the Company's action rendered the access provision ineffective. Remands to arbitrators have been deemed appropriate in those cases where the arbitration award is so vague or ambiguous as to be incapable of enforcement. *See, e.g.*, United Steelworkers v. W.C. Bradley Co., 551 F.2d 72 (5th Cir. 1977); San Antonio Newspaper Guild v. San Antonio Light Division, 481 F.2d 821 (5th Cir. 1973). The award in this case contained no ambiguity rendering it incapable of enforcement. The finding that no violation of the agreement had resulted from the Company's action in barring Mason from its premises was unequivocal. The district court's remand of the case to the arbitrator was improper.

The Company contends that even if the remand was proper, the district court erred in vacating the supplemental award based on its own interpretation of the agreement. A reading of the district court's order vacating the supplemental award (R.1, 353-61) discloses that the court's rejection of the award was premised on its disagreement with the arbitrator's analysis. The former Fifth Circuit has held that "[i]f the reasoning is so pal-

pably faulty that no judge, or group of judges, could ever conceivably have made such a ruling then the Court can strike down the award." Safeway Stores v. American Bakery & Confectionary Workers International Union, 390 F.2d 79, 82 (5th Cir. 1968). Where the error in reasoning is not so gross, however, the general rule prohibiting the courts from a review of the merits governs. *See Enterprise Wheel*, 363 U.S. at 598-99, 80 S.Ct. at 1362; *Waverly Mineral*, 633 F.2d at 684. Here the arbitrator's reasoning was rationally based on the collective bargaining agreement and the law of the shop. The district court's journey into the merits of the case was error and amounted to nothing more than a substitution of its own view of the dispute for that of the arbitrator in contravention of Supreme Court and Former Fifth Circuit precedent.

The Union contends that the district court erred in refusing to grant affirmative relief following the vacation of the arbitration awards. Because the Company was entitled to have the award enforced from the outset, the Union is not entitled to the requested relief.

Lastly, the Company contends that it is entitled to an award of attorneys' fees. The district court has authority to award attorneys' fees where it determines that a party has refused to abide by the arbitrator's award without justification. *Texas Steel Co.*, 538 F.2d at 1121; *U.S. Gypsum Co.*, 492 F.2d at 734. Because the district court vacated the award at the Union's request, the Company was not entitled to an award of attorneys' fees. However, the district court should have enforced the arbitration award. This result may give rise to a basis for an award of attorneys' fees to the Company and, therefore, the case is remanded to the district court for a determination of this issue.

The summary judgment entered in favor of the Union is reversed; the arbitrator's decisions are reinstated and ordered enforced; the matter is remanded with instructions.

APPENDIX B

(FMCS No. 78K11738)

In the matter of arbitration between LOCKHEED-GEORGIA COMPANY, a division of Lockheed Aircraft Corporation, MARIETTA, GEORGIA and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, LOCAL LODGE 709, MARIETTA, GEORGIA	Opinion and Award of Arbitrator Roger C. Williams March 27, 1979

ARBITRATOR: Roger C. Williams, Tuscaloosa, Alabama, selected by the parties under procedures of the Federal Mediation and Conciliation Service in accordance with the terms of their Agreement.

APPEARANCES:

FOR THE COMPANY: Duane P. Aldrich and Slayton Tuggle, of Kilpatrick, Cody, Rogers, McClatchey and Regenstein, Attorneys at Law, Atlanta, Georgia; Robert P. Barton, Company Counsel, Marietta, Georgia.

FOR THE UNION: Reeves Bowen, Jr., President, Local Lodge 709, Marietta, Georgia; J. Leon Adair, of Adair, Goldthwaite and Daniel, P. A., Attorneys at Law, Atlanta, Georgia.

WILLIAMS, Arbitrator: On May 3, 1977, the Company permanently barred Union Business Representative R. P. Mason (hereinafter referred to as "Grievant") from the Company's plant and all other Company-controlled

property (*See*, Joint Exhibit #3). Local Lodge 709 filed a written grievance (Joint Exhibit #2A) on May 11, 1977, alleging that the Company's action was contrary to the provisions of the collective bargaining Agreement and requesting that the bar be removed. On May 12, 1977, the Union filed charges of unfair labor practices against the Company, alleging that the Company violated Sections 8(a)(1), (2), (3) and (5) of the National Labor Relations Act by its treatment of Grievant (Company Exhibit #5), and on June 22, 1977, the NLRB deferred further proceedings pending resolution of the grievance (Company Exhibit #6). The parties did not resolve the dispute and referred the matter to arbitration. The arbitration hearing was duly held on August 10, August 11, September 18 and September 19, 1978, in Atlanta, Georgia. The parties filed post-hearing briefs on November 30, 1978.

An incident which occurred on April 29, 1977 in the office of Department Manager Sam Bereznak prompted the Company to bar Grievant from Company facilities. Grievant, Bereznak, Shop Steward J. D. Scarbrough and Production Supervisor Jim Chesser were present. Grievant was standing inside the doorway and was heatedly addressing Bereznak, who was seated at his desk. Bereznak and Chesser testified that Grievant purposely struck Chesser in the stomach with his left elbow when Chesser walked behind Grievant on his way to or through the doorway. Both testified that Grievant's blow was very hard, and that Chesser "doubled over" after he was struck. A medical examination by a Company physician later that day revealed a contusion of the abdomen and marked abdominal muscle tenderness. Chesser testified that the area where Grievant struck him was sore for three days, but required no medical treatment. Grievant and Scar-

brough testified to the contrary that Chesser bumped into Grievant. Grievant unequivocally denied striking Chesser on April 29, 1977, and testified that he left Bereznak's office completely unaware that he would be accused of striking Chesser. He stated that the only physical contact between them was when Chesser bumped into him, and Scarbrough's testimony corroborated Grievant's version of the occurrences in Bereznak's office.

On several occasions since Grievant became a Business Representative in 1969 the Company has notified the officials of Local Lodge 709 of allegations that Grievant has physically or verbally abused management personnel. Company and Union officials have held a number of meetings and discussion over the years with regard of these allegations of misconduct by Grievant. Company witnesses testified to a number of prior instances when Grievant had been physically or verbally abusive or threatening to management personnel, including an incident on March 29, 1976, when Grievant had an altercation with Division Manager Webb Wright. Wright testified that Grievant kicked him in the leg on that occasion. Grievant denied that he had kicked Wright and testified that Wright tried to hit him with a telephone. As a result of the incident, the Company notified the Union by letter (Company Exhibits #2 and #3) that Grievant would be required to adhere strictly to the limitations of the Agreement in his contacts with management personnel and that his grievance procedure meetings would be held in the Labor Relations office, and warned the Union that "further overt actions against members of management, may result in disciplinary action and, in addition, the barring of Mr. Mason from the plant." In his testimony, Grievant denied the occurrence of all instance of physical or verbal abuse which were testified

to by Company witnesses, and described what happened on those occasions differently than the testimony of Company witnesses.

The Company contends that Grievant was barred from Company facilities in order to protect management personnel from his abusive behavior, to preclude additional misconduct by Grievant, and to meet the Company's contractual obligation to provide a safe working place to its employees. In support of its contention, the Company cites Article V, Section 1 of the Agreement, which provides in pertinent part:

> The Company agrees to maintain sanitary, safe and healthful conditions in all its plants and working establishments in accordance with applicable laws. . . .

The Company asserts that Grievant's long history of intimidating physical abuse, verbal abuse and threatening behavior toward supervisory and labor relations personnel justified the imposition of the bar from Company facilities, and contends that the Company has no obligation to allow Grievant access to the plant to engage in the sort of misconduct which he has committed repeatedly in the past. The Company denies that any anti-union motivation prompted the decision to bar Grievant, and points out that the Company has continued to deal with Grievant as a Business Representative of the Union at locations outside the plant since he was barred from Company facilities.

The Union contends that by barring Grievant from the plant the Company violated Article II, Section 2 of the Agreement, which states:

> The President, Vice-President and Business Representatives of the Union *shall have access to the Labor*

Relations Department Office for the purpose of contacting Labor Relations personnel and *shall have access to the departments of the Company's plant* to which they are assigned for the sole purpose of contacting the Union Steward or Committeeman concerning employee complaints or grievances or matters arising out of the application of this Agreement. Such visits shall be subject to such regulations as may be made from time to time by the Company. The Company *shall not impose regulations which will render ineffective the purpose of this Section.* Before entering the Company's plant for the above purpose, the President, Vice-President, or a Business Representative shall notify the Labor Relations Department of the date and time he will be in the plant, and the name of the Union Steward or Committeeman he will contact.

The President, Vice-President or Business Representative shall not discuss any problem with employees (other than the Steward and Committeeman) or with the supervision of any department. (Emphasis supplied)

The Union argues that the Company has not proven that Grievant is guilty of the misconduct for which the Company barred him from the Company's facilities. In the alternative, the Union asserts that even if Grievant is guilty, the Company has no right to bar Grievant from the plant on account of his misconduct, and that other methods of controlling Grievant's alleged misbehavior are available. The Union contends that Grievant is unable to fully perform the duties of his position as a Business Representative without access to the plant, and that the Company was motivated to bar Grievant from the plant by a desire to reduce Grievant's effectiveness as an aggressive representative of bargaining unit employees.

Although the Company initially refused to meet or deal

directly with Grievant after he was barred from the plant, the parties have since held Step 3 meetings and arbitration hearings at the FMCS office in Atlanta, Georgia in all cases in which Grievant has been involved as Business Representative, and Grievant has participated fully in such meetings and hearings, but the Company has refused to hold Step 2 meetings, in which Business Representatives may participate by request, at the FMCS office, and Grievant has been unable to participate in Step 2 meetings and "Step 1½" meetings since he was barred from Company facilities.

The parties submitted the dispute to arbitration by separate submission statements. Each statement stipulated that the matter was arbitrable and properly before the arbitrator. The issue presented for resolution by arbitration is whether or not the Company violated the Agreement by permanently barring Business Representative R. P. Mason from all Company-controlled property on May 3, 1977.

OPINION

The evidence presents as a factual question whether or not Grievant assaulted Chesser in Bereznak's office on April 29, 1977. The testimony presented by those who witnessed or took part in the events conflicts markedly. The evidence is reasonably convincing, however, that Grievant committed the misconduct alleged and purposely struck Chesser in the stomach with his elbow. The testimony of Bereznak and Chesser is credible and convincing, and their version of the incident is not rebutted by Grievant's self-serving testimony corroborated by Scarbrough. I am satisfied that the events occurred substantially as Bereznak and Chesser described them. The Company has effectively proven and has met the burden of proof re-

quired to support a conclusion that Grievant physically assaulted Chesser on that occasion. The testimony has also shown with reasonable certainty that Grievant has committed physical assaults upon management personnel on several occasions in the past. Grievant's assault on Chesser culminated a series of incidents in which Grievant committed the serious misconduct of physically abusing management personnel.

While it is generally accepted that Union officials may be persistent and aggressive in the performance of their duties as bargaining representatives, and may forcefully assert the rights of bargaining unit employees, attempts to intimidate by physical violence clearly go far beyond the acceptable limits of aggressive representation. Neither party is obligated to tolerate physical abuse simply because it takes place during the collective bargaining process or is perpetrated by one who is a representative of the opposing party in labor-management relations. In this instance, Grievant's physical violence toward Chesser was conduct which went beyond the limit of acceptable conduct, and the Company had the right to bar Grievant from the plant in order to prevent a recurrence of misconduct which had occurred repeatedly.

The evidence has not proven that the Company barred Grievant because of a desire to impair his effectiveness as a Business Representative, or that the Company sought to impair the bargaining relationship between the parties by barring Grievant from Company-controlled facilities. No improper motive for the action barring Grievant from the Company's facilities was proven, and the evidence has shown that the Company barred Grievant solely to avoid further or additional physical abuse of management personnel by Grievant. Grievant's ability to fully perform

his job as a Business Representative has been hampered to some degree by his lack of access to the plant, but the Company has been reasonable in its attempts to minimize the adverse effects which were the consequence of the action.

A rule of reasonableness must be used to interpret and apply the provisions of collective bargaining agreements. Article II, Section 2 of the Agreement specifically gives Business Representatives of the Union the right to access to the Labor Relations Department Office and the departments of the plant for specified purposes. Implicit in those provisions is the requirement that Business Representatives conduct themselves in a manner consistent with commonly accepted behavior in their adversary relationship with management personnel. The right to access to Company facilities may properly be denied an individual who commits physical violence toward others, activity which is clearly beyond the limit of acceptable behavior. A Business Representative who exercises his right of access by physically abusing management personnel may properly be denied that right. Grievant's physical abuse of management personnel was sufficiently serious misconduct, committed while he was exercising his right to access to the plant, to justify the Company's action in barring him from Company-controlled facilities. After he and Local Lodge 709 had been warned of the consequences, he engaged in activity not included in the specified purposes for which he had been granted the right to have access to the plant, and the physical violence which he perpetrated on management personnel went far beyond any activity which could reasonably be expected of or tolerated from a Business Representative engaged in the representation of bargaining unit employees or the aggressive advocacy of employee rights. Grievant's conduct

while in the Company's plant amounted to an abuse of his right to have access to the plant. The Company's action in permanently barring Grievant from the plant was justified by his misconduct and did not violate the Agreement.

AWARD

The grievance filed on May 11, 1977 is denied.

/s/ ROGER C. WILLIAMS
ROGER C. WILLIAMS, Arbitrator

APPENDIX C

[Filed in Clerk's Office June 22, 1979;
Ben H. Carter, Clerk; By: ? , Deputy Clerk]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

AERONAUTICAL MACHINISTS LODGE 709, IAM&AW, AFL-CIO, *Plaintiff*, vs. LOCKHEED GEORGIA COMPANY, division of LOCKHEED AIRCRAFT CORPORATION, *Defendant.*	CIVIL ACTION FILE NO: C79-1085A

COMPLAINT

The complaint of Aeronautical Machinists Lodge 709, to vacate and set aside an arbitration award respectfully shows:

1.

The defendant, Lockheed Georgia Company, division of Lockheed Aircraft Corporation, has its principal office and place of doing business in Cobb County, Georgia within the Northern District of Georgia. Lockheed is a California corporation doing business in Georgia, through the Lockheed Georgia Company and others of its divisions.

2.

The plaintiff, Aeronautical Machinists Lodge 709, of the International Association of Machinists and Aerospace Workers, AFL-CIO, is a labor organization which

is the collective bargaining representative of non-supervisory employees of Lockheed Georgia Company, an industry affecting commerce.

3.

Jurisdiction of this Court is based upon 29 USC 185 and 28 USC 1331. Jurisdiction is also based upon 9 USC 1, et seq., including 9 USC 10. While no jurisdictional amount is necessary in this action, the rights involved exceed $10,000.00 in value.

4.

On May 3, 1977, the defendant permanently barred plaintiff's senior Business Representative, R. P. Mason, from access to defendant's premises. Pursuant to the provisions of the collective bargaining agreement in effect between plaintiff and defendant, on May 11, 1977, plaintiff filed a grievance alleging that the barring of Business Representative Mason from Lockheed premises was in violation of such collective bargaining agreement.

5.

In due course such grievance was submitted to arbitration before Arbitrator Roger C. Williams, an arbitrator selected by the parties, in accordance with the provisions of the collective bargaining agreement. The provisions of the agreement providing for arbitration of grievances are set forth in Exhibit 1 attached hereto.

6.

Following hearings held on August 10, August 11, September 18 and September 19, 1978, Arbitrator Williams issued his opinion and award on March 27, 1979. Copy of such opinion and award is attached hereto as Exhibit 2.

7.

Such opinion and award is illegal and contrary to law and should be vacated and set aside and held to be void and of no effect for the following reasons, separately and severally:

1. The arbitrator did not decide the issue set forth in plaintiff's grievance and submitted to him and his opinion and award was in excess of the authority conferred upon and vested in the arbitrator.

2. In reaching his opinion and award, the arbitrator considered evidence which he had specifically excluded as evidence by ruling upon objections made by plaintiff, and plaintiff was thereby entrapped, mislead and deluded from submitting evidence, which was available in rebuttal to such improperly and illegally considered evidence and which would have explained, disproved and/or rebutted such excluded and improperly considered evidence. Plaintiff was thereby deprived of due process and of a fair hearing so as to vitiate the opinion and award based upon such improperly and illegally considered evidence.

3. The decision and award is in contradiction and disregard of the clear terms of the collective bargaining agreement and is therefore in excess of the authority of the arbitrator and is illegal and contrary to law.

WHEREFORE, plaintiff prays that summons issue, that the opinion and award of Arbitrator Williams be vacated and set aside, that a new arbitration be ordered or that the plaintiff's grievance be upheld by the Court,

and for such other relief or may be proper, including plaintiff's costs.

Respectfully submitted,

By: /s/ J. R. GOLDTHWAITE, JR.
J. R. GOLDTHWAITE, JR.

ADAIR, GOLDTHWAITE & DANIEL, P.A.
600 Rhodes-Haverty Building
Atlanta, Georgia 30303
(404) 522-5950

APPENDIX D

[Filed in Clerk's Office July 17, 1979;
Ben H. Carter, Clerk, By: PK, Deputy Clerk]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

AERONAUTICAL MACHINISTS LODGE 709, IAM&AW, AFL-CIO, *Plaintiff*, v. LOCKHEED-GEORGIA COMPANY, division of LOCKHEED AIRCRAFT CORPORATION, *Defendant.*	CIVIL ACTION FILE NO. C79-1085A

ANSWER AND COUNTERCLAIM

Lockheed-Georgia Company, a division of Lockheed Corporation (hereinafter "Lockheed"), named as Defendant in the above-styled action, answers the Complaint as follows:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Plaintiff has agreed that the dispute underlying this action would be subject to final and binding resolution in an arbitral forum, and therefore some or all of the claims asserted in this action have been waived or are otherwise barred.

THIRD DEFENSE

Lockheed, for its answer to the specific allegations of the Complaint, responds as follows:

1.

Lockheed admits that Lockheed-Georgia Company is a division of Lockheed Corporation (incorrectly referred to in the Complaint as Lockheed Aircraft Corporation), admits that Lockheed-Georgia Company has its principal office and place of doing business in Cobb County, Georgia, admits that Lockheed Corporation is a California corporation doing business in Georgia through Lockheed-Georgia Company, and is without knowledge or information sufficient to form a belief as to the truth of any remaining allegations in paragraph 1 of the Complaint.

2.

Lockheed admits that Plaintiff is a labor organization which represents certain non-supervisory employees of Lockheed-Georgia Company for the purpose of collective bargaining, admits that Lockheed is engaged in an industry affecting commerce, and is without knowledge or information sufficient to form a belief as to the truth of any remaining allegations in paragraph 2 of the Complaint.

3.

Lockheed admits that plaintiff purports to invoke the jurisdiction of this Court based upon 29 U.S.C. §185, 28 U.S.C. §1331, and 9 U.S.C. §1 *et seq.*, denies that the Court's jurisdiction has been properly invoked pursuant to said statutory provisions, and is without knowledge or information sufficient to form a belief as to the truth of any remaining allegations in paragraph 3 of the Complaint.

4.

Lockheed admits the allegations of paragraph 4 of the Complaint, with the exception that Lockheed is without knowledge or information sufficient to form a belief as to the truth or meaning of the characterization of R. P. Mason as "senior Business Representative."

5.

Lockheed admits that the grievance referred to in paragraph 4 of the Complaint was submitted to arbitration before Arbitrator Roger C. Williams, an arbitrator selected in accordance with the provisions of the collective bargaining agreement between Plaintiff and Defendant, admits that Exhibit 1 to the Complaint appears to contain certain excerpts from the collective bargaining agreement in effect in May, 1977, between Plaintiff and Defendant, and is without knowledge or information sufficient to form a belief as to the truth of any further allegations in paragraph 5 of the Complaint.

6.

Lockheed admits that after a hearing held on August 10, August 11, September 18, and September 19, 1978, Arbitrator Williams issued an opinion and award dated March 27, 1979, and admits that Exhibit 2 to Lockheed's service copy of the Complaint is a copy of said opinion and award.

7.

Lockheed denies the allegations in paragraph 7 of the Complaint.

8.

Lockheed denies all allegations in the Complaint which

have not heretofore been specifically admitted, denied, or otherwise controverted.

COUNTERCLAIM

Comes now Defendant Lockheed, pursuant to Rule 13 of the Federal Rules of Civil Procedure, and for its Counterclaim shows the Court as follows:

1.

Lockheed hereby seeks confirmation of an award of an arbitrator rendered pursuant to a collective bargaining agreement. Jurisdiction is conferred upon this Court pursuant to Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. §185 (hereinafter the "Act") and 28 U.S.C. §1337. Jurisdiction also exists by virtue of the status of this claim as a compulsory counterclaim under Rule 13 of the Federal Rules of Civil Procedure. No jurisdictional amount is required.

2.

Defendant Lockheed-Georgia Company, a division of Lockheed Corporation, a California corporation having manufacturing facilities and offices within this judicial district, is an employer in an industry affecting commerce within the meaning of Section 301 of the Act.

3.

Plaintiff Aeronautical Machinists Lodge 709 of the International Association of Machinists and Aerospace Workers, AFL-CIO, is an unincorporated labor organization within the meaning of Sections 2(5) and 301(a) of the Act. Its duly authorized officers or agents are engaged within this judicial district in representing employees within the meaning of Section 301(c) of the Act. Plaintiff

is an authorized bargaining representative for certain non-supervisory employees at Lockheed's facilities in Cobb County, Georgia. Lodge 709 is subject to the jurisdiction of this Court.

4.

Venue in this district and division is proper with respect to all parties, pursuant to 29 U.S.C. §185.

5.

At all times pertinent to this action, Lodge 709 and Lockheed were parties to a collective bargaining agreement (hereinafter the "Contract"). Pursuant to the Contract, an arbitration hearing was held before Arbitrator Roger C. Williams on August 10, August 11, September 18, and September 19, 1978, and after both Lockheed and Lodge 709 filed post-hearing briefs addressing the issues before the arbitrator, Arbitrator Williams issued an opinion and award dated March 27, 1979.

6.

The dispute presented to Arbitrator Williams was whether Lockheed had violated the Contract by barring Business Representative R. P. Mason from Lockheed-controlled property on May 3, 1977.

7.

In light of the evidence adduced at the hearing, Arbitrator Williams found, and stated, *inter alia*, in his Opinion and Award:

> The right to access to Company facilities may properly be denied an individual who commits physical violence toward others, activity which is clearly beyond the limit of acceptable behavior. A Business Representative who exercises his right of access by

physically abusing management personnel may properly be denied that right. Grievant's physical abuse of management personnel was sufficiently serious misconduct, committed while he was exercising his right to access to the plant, to justify the Company's action in barring him from Company-controlled facilities. After he and Local Lodge 709 had been warned of the consequences, he engaged in activity not included in the specified purposes for which he had been granted the right to have access to the plant, and the physical violence which he perpetrated on management personnel went far beyond any activity which could reasonably be expected of or tolerated from a Business Representative engaged in the representation of bargaining unit employees or the aggressive advocacy of employee rights. Grievant's conduct while in the Company's plant amounted to an abuse of his right to have access to the plant. The Company's action in permanently barring Grievant from the plant was justified by his misconduct and did not violate the Agreement.

8.

By seeking to have Arbitrator Williams' Opinion and Award vacated and set aside, Lodge 709 seeks, without justification, to avoid its obligation under the Contract to recognize and abide by the decision of the arbitrator, which pursuant to the terms of the Contract shall be final and binding upon the parties.

WHEREFORE, Lockheed prays:

(a) that judgment in this action be entered in favor of Defendant Lockheed, that the Complaint be dismissed with prejudice, and that Defendant Lockheed be dismissed therefrom;

(b) that the Court enter an order confirming the award of Arbitrator Williams;

(c) that judgment in this action be entered against Lodge 709 and in favor of Lockheed for costs in this action;

(d) that Lockheed be awarded reasonable attorneys' fees; and

(e) that Lockheed be awarded such other and further relief as this Court may deem just and proper.

OF COUNSEL:

KILPATRICK, CODY,
ROGERS, MCCLATCHEY
& REGENSTEIN
3100 Equitable Building
100 Peachtree Street
Atlanta, Georgia 30303
(404) 572-6500

/s/ DUANE C. ALDRICH
DUANE C. ALDRICH
per RST

/s/ R. SLATON TUGGLE III
R. SLATON TUGGLE III

LOCKHEED-GEORGIA
COMPANY
Dept. 85-03, Bldg. B-2
Zone 35
Marietta, Georgia 30060
(404) 424-3388

/s/ ROBERT P. BARTON
ROBERT P. BARTON
per RST

APPENDIX E

[Filed in Clerk's Office U.S.D.C. – Atlanta June 30, 1980; Ben H. Carter, Clerk. By: MH, Deputy Clerk]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

AERONAUTICAL MACHINISTS LODGE 709, IAM&AW, AFL-CIO, *Plaintiff*, v. LOCKHEED GEORGIA COMPANY, division of LOCKHEED AIRCRAFT CORPORATION, *Defendant.*	CIVIL ACTION C79-1085A

ORDER

This matter is before this Court on cross motions for summary judgment. Plaintiff ("the Union") seeks to have an arbitration award vacated, and defendant ("the Company") seeks to have it confirmed. There appear to be three issues for the Court to consider:

1. Whether the arbitrator acted outside the authority conferred upon him by the collective bargaining agreement between the parties,

2. Whether the arbitrator decided the issue submitted to him by agreement of the parties, and

3. Whether the arbitrator deprived the Union of a fair hearing by improperly relying on certain evidence.

The dispute between the parties arose when the Company permanently barred one of the Union's business representatives, R. P. Mason, from access to "any Lockheed

controlled property." The Union filed a grievance with the Company requesting that it remove the bar and contending that the Company's action violated the collective bargaining agreement. The Company denied the grievance, and the parties agreed to arbitration of the dispute. The Union's contention is that the Company's action violated the following provision of the collective bargaining agreement:

> The President, Vice-President and Business Representatives of the Union *shall have access to the Labor Relations Department Office for the purpose of contacting Labor Relations personnel and shall have access to the departments of the Company's plant to which they are assigned for the sole purpose of contacting the Union Steward or Committeeman concerning employee complaints or grievances or matters arising out of the application of this Agreement.* Such visits shall be subject to such regulations as may be made from time to time by the Company. *The Company shall not impose regulations which will render ineffective the purposes of this Section.* Before entering the Company's plant for the above purpose, the President, Vice-President, or a Business Representative shall notify the Labor Relations Department of the date and time he will be in the plant, and the name of the Union Steward or Committeeman he will contact. (Emphasis added.)

This Court has jurisdiction under the Labor-Management Relations Act, 29 U.S.C. §185, to entertain suits for the enforcement of an arbitration award. In this case the facts are not disputed, and it is appropriate to consider the contentions of the parties on cross motions for summary judgment. The role of this Court in reviewing arbitration awards is limited, however. This Court is not to review the merits of the award, including findings of fact and construction and application of the collective

bargaining agreement. *See United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *Communications Workers v. Western Electric Co., Inc.*, 558 F.2d 816 (5th Cir. 1977), *aff'g* 397 F.Supp. 1318 (N.D. Ga. 1975). Otherwise, the policy of submitting disputes to arbitration, before arbitrators who have knowledge of a particular industry, would be frustrated. The Court may consider whether a matter is arbitrable and properly before an arbitrator, but in this case the parties have stipulated those facts.

This Court may also consider whether an arbitrator has exceeded the authority conferred upon him by a collective bargaining agreement:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look to guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

United Steelworkers v. Enterprise Wheel and Car Corp., supra, at 597. An arbitrator may not go beyond interpretation and application of the collective bargaining agreement. *Communication Workers v. Western Electric Co., Inc., supra.*

The issue which the parties presented to the arbitrator was whether the Company violated the collective bargaining agreement by permanently barring Mr. Mason from all Lockheed controlled property. The award and opinion indicate that the arbitrator's concern was whether

the Company's bar against Mr. Mason's presence on its property was justified. The arbitrator appeared to conclude that if the action was justified it was not a violation of the agreement, and he found that a rule of reasonableness must be used to interpret and apply the provisions of the collective bargaining agreement. His final determination was that the Company's action "was justified by [Mr. Mason's] misconduct and did not violate the Agreement."

It appears to this Court that the arbitrator went beyond the issue submitted to him in making his determination. The issue which was before the arbitrator was not whether the Company was justified in barring Mr. Mason from its property. It was instead whether the Company's action rendered ineffective the purposes of the provision of the collective bargaining agreement which allowed Mr. Mason access to property of the Company for the purpose of performing his job as business representative (hereinafter referred to as "the business representative provision"). If the arbitrator had found that the Company's action did render ineffective the purposes of that provision, he would have been required to conclude that the Company violated the agreement according to its terms, no matter how justified he might have found that violation to be. The parties have agreed that the Company *shall not* render ineffective the purposes of the business representative provision. *See Communication Workers v. Western Electric Co., Inc., supra.*

The arbitrator noted that Mr. Mason's ability to fully perform his job as a business representative has been hampered to some degree by his lack of access to the plant, but this Court feels that the opinion does not focus on whether the Company's action *renders ineffective* the

business representative provision in violation of the agreement. Accordingly, this matter is REMANDED to the arbitrator for clarification or for additional findings on that issue.

The Court finds that the other two issues raised by the Union do not require a refusal to enforce the award. The contention that the arbitrator did not decide the issue submitted to him is based on the fact that throughout his opinion the arbitrator referred to Mr. Mason as the grievant when, in fact, the Union was the grievant. The Court finds that this does not indicate a failure to decide the issues presented. The Court has already indicated the extent to which it considers the arbitrator not to have decided the issue submitted.

The Union's third contention is based on the fact that the arbitrator admitted into evidence certain reports to which the Union objected on the ground that they were hearsay. The arbitrator assured the Union that the reports were not being admitted as evidence of the truth of the matters described in them. The Union contends that the arbitrator nevertheless relied upon the reports as evidence of the truth of those matters. This Court finds, however, that there was testimony as to those same matters. The arbitrator's opinion refers to that testimony, and this Court must conclude that the arbitrator relied on the testimony and not on the reports which were admitted for a limited purpose.

In summary, this matter is REMANDED to the arbitrator for clarification or further findings on the issue of whether the Company's action in permanently barring Mr. Mason from its premises rendered ineffective the purposes of the business representative provision and thereby violated the collective bargaining agreement. The

Company has requested an award of attorney's fees on the ground that the Union has unjustifiably refused to abide by the award of an arbitrator. Such is not the case, however, and the request for attorney's fees is DENIED.

IT IS SO ORDERED, this 30th day of June, 1980.

/s/ MARVIN H. SHOOB

MARVIN H. SHOOB, Judge
United States District Court
Northern District of Georgia

APPENDIX F

(FMCS No. 78K11738)

In the matter of arbitration

between

LOCKHEED-GEORGIA COMPANY, a division of Lockheed Corporation, MARIETTA, GEORGIA and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, LOCAL LODGE 709, MARIETTA, GEORGIA	Supplemental Opinion and Award of Arbitrator March 4, 1981

ARBITRATOR: Roger C. Williams, Tuscaloosa, Alabama.

APPEARANCES:

FOR THE COMPANY: Duane P. Aldrich and Slayton Tuggle, of Kilpatrick and Cody, Attorneys at Law, Atlanta, Georgia; Robert P. Barton, Company Counsel, Marietta, Georgia.

FOR THE UNION: J. R. Goldthwaite, Jr., of Adair, Goldthwaite and Daniel, P. A., Attorneys at Law, Atlanta, Georgia.

WILLIAMS, Arbitrator: On June 22, 1979 the Union filed Civil Action No. C79-1085A in the United States District Court for the Northern District of Georgia, Atlanta Division, to set aside the undersigned arbitrator's Opinion and Award issued on March 27, 1979. On July 17, 1979 the Company filed a counterclaim seeking confirmation of the Opinion and Award, and both parties

subsequently filed motions for summary judgment. On June 30, 1980 the Court ordered the matter remanded to the arbitrator "for clarification or further findings on the issue of whether the Company's action in permanetly barring Mr. Mason from its premises rendered ineffective the purposes of the business representative provision [Article II, Section 2 of the Agreement] and thereby violated the collective bargaining agreement." After other proceedings, the Court on October 15, 1980 directed the parties "to resubmit this matter to the arbitrator . . . for clarification or for further findings as ordered on June 30, 1980."

The arbitrator has received copies of collective bargaining agreements between the parties covering the period from 1951 to 1980 and a copy of the Court file in Civil Action No. C79-1085A. Both parties filed briefs which were received by the arbitrator on December 22, 1980.

CLARIFICATION

Article II, Section 2 of the parties' collective bargaining agreement provides in pertinent part:

> . . . Business Representatives of the Union shall have access to the Labor Relations Department Office for the purpose of contacting Labor Relations personnel and shall have access to the departments of the Company's plant to which they are assigned for the sole purpose of contacting the Union Steward or Committeeman concerning employee complaints or grievances or matters arising out of the application of this Agreement. Such visits shall be subject to such regulations as may be made from time to time by the Company. The Company shall not impose regulations which will render ineffective the purpose of this Section. . . .

General rights which are explicitly granted in collective

bargaining agreements are not intended to cover every eventuality, and seemingly unrestricted rights include implicit restrictions or limitations which are effectuated only when unusual and unanticipated circumstances arise. While not explicitly stated in Article II, Section 2 of the Agreement, it is implicit in those provisions that the right of access granted to Union Business Representatives is contingent upon their conducting themselves in a manner which is consistent with the purposes for which access has been granted, and that the right to access may be lost by the failure to fulfill the obligation for proper conduct while exercising the right.

Every contractual right creates a corresponding obligation. The Union's contractual right to have Business Representatives granted access to the plant creates an obligation that those who exercise the right conduct themselves in a manner which is generally consistent with commonly accepted norms of mature behavior in the collective bargaining relationship. A Business Representative who exercises the right to access to the plant is obligated to refrain from engaging in activity which exceeds the limits of acceptable conduct. Since a Business Representative exercises the right to access to plant premises only by virtue of his position, and exercises the right as the agent of the Union, the Union bears the responsibility for his actions, and has the obligation to assure that he acts properly. In terms of the facts of this case, Business Representative R. P. Mason was obligated to refrain from physically assaulting management personnel in the exercise of the right to access to plant premises, and the Union was obligated to assure that Mason behaved in an acceptable manner while he exercised the Union's right for him to have access to the plant in his official capacity.

Mason's conduct while he exercised his right to access to the plant as a Business Representative was repugnant to the collective bargaining process, was an abuse of the right to access to the plant, and constituted a complete failure to fulfill his obligation for proper conduct while acting in an official capacity. By engaging in such conduct, he breached the implicit obligation for proper conduct, upon which the right to access to the plant is contingent under Article II, Section 2 of the Agreement. By breaching the obligation for proper conduct while acting in an official capacity, Mason waived and forfeited his corresponding right as a Business Representative to have access to the plant, and waived and forfeited the Union's corresponding right to have Mason granted access to the plant in his official capacity. On the basis of Mason's forfeiture and waiver of the right to access to the plant, the Company had the authority to rescind the right to access as it applied to Mason, and the Company did not violate Article II, Section 2 of the Agreement by permanently barring Mason from Company controlled premises.

As it relates to this matter, the purpose of Article II, Section 2 of the Agreement is to facilitate the Business Representatives' performance of specified duties by allowing them access to the Labor Relations Department Office and their assigned plant departments for the performance of specified tasks. The Company's action rendered the purpose ineffective as to Mason, an an individual Business Representative, but the general purpose of the provision was not rendered ineffective when Mason was barred since all other Business Representatives continued to have access to the plant. Article II, Section 2 specifically provides that the Company may regulate visits by Business Representatives to the Labor Relations Department Office and their assigned departments and that

the "Company shall not impose regulations which will render ineffective the purpose of this Section." The "regulations" provided for refer to rules or restrictions on the manner in which plant visits are to be made. By barring Mason for Company premises, the Company did not regulate *visits* made under Article II, Section 2, but rescinded Mason's *right* to access and the Union's right to have Mason granted access to plant premises, based on the implicit contractual authority which arose from Mason's persistent and outrageous breach of the obligation for proper conduct. Thus, the bar to Mason's entry was not a regulation on plant visits which rendered the purpose of Article II, Section 2 ineffective, and the Company did not violate Article II, Section 2 by imposing the bar.

Upon complete review of this matter, I hold that the Company's action barring Mason from access to Company property did not "render ineffective" the purposes of the provisions of Article II, Section 2 of the Agreement which had previously allowed Mason access to Company premises, and that the bar to access to Company premises was not a regulation "which will render ineffective the purpose of" Article II, Section 2.

/s/ ROGER C. WILLIAMS

ROGER C. WILLIAMS, Arbitrator

APPENDIX G

[Filed in Clerk's Office U.S.D.C.—Atlanta, Sep. 11, 1981; Ben H. Carter, Clerk. By BM, Deputy Clerk.]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

AERONAUTICAL MACHINISTS LODGE 709, IAM&AW, AFL-CIO, *Plaintiff*, v. LOCKHEED-GEORGIA COMPANY, division of LOCKHEED AIRCRAFT CORPORATION, *Defendant.*	CIVIL ACTION C79-1085A

ORDER

This action was commenced by plaintiff (the Union) to vacate an arbitration award. The award denied the Union's request that defendant (the Company) be required to remove its bar to business representative R. P. Mason from any Lockheed controlled property. The Union argues that the Company's bar violated the folowing provision of their collective bargaining agreement:

> The President, Vice-President and *Business Representatives* of the Union *shall have access* to the Labor Relations Department Office for the purpose of contacting Labor Relations personnel and *shall have access* to the Departments of the Company's plant to which they are assigned for the sole purpose of contacting the Union Steward or Committeeman concerning employee complaints or grievances or matters arising out of the application of this Agreement. Such visits shall be subject to *such regulations* as may be made from time to time by the Company. *The*

> *Company shall not impose regulations which will render ineffective the purpo es of this Section . . .*

(Emphasis added.) Collective Bargaining Agreement at Art. II, Sec. 2 [hereinafter cited as Agreement].

On June 30, 1980, this Court issued an order remanding the case to the arbitrator for clarification or further findings on the issue of whether the Company's action, permanently barring Mr. Mason from its premises, rendered ineffective the purposes of the business representative provision and thereby violated the collective bargaining agreement. June 30, 1980 order at p. 5. Therein, the Court stated, *inter alia*, the following:

> The issue which the parties presented to the arbitrator was whether the Company violated the collective bargaining agreement by permanently barring Mr. Mason from all Lockheed controlled property. The award and opinion indicate that the arbitrator's concern was whether the Company's bar against Mr. Mason's presence on its property was justified. The arbitrator appeared to conclude that if the action was justified it was not a violation of the agreement, and he found that a rule of reasonableness must be used to interpret and apply the provisions of the collective bargaining agreement. His final determination was that the Company's action "was justified by [Mr. Mason's] misconduct and did not violate the Agreement."
>
> It appears to this Court that the arbitrator went beyond the issue submitted to him in making his determination. The issue which was before the arbitrator was not whether the Company was justified in barring Mr. Mason from its property . . . If the arbitrator had found that the Company's action did render ineffective the purposes of that provision [Art. 2, Sec. 2], he would have been required to conclude that the Company violated the agreement according

> to its terms, no matter how justified he might have found that violation to be. The parties have agreed that the Company *shall not* render ineffective the purposes of the business representative provision. *See Communication Workers v. Western Electric, Inc., supra* [558 F.2d 816 (5th Cir. 1977), *aff'g* 397 F.Supp. 1318 (N.D. Ga. 1975) (per curiam)].

Defendant asked this Court to reconsider its Order of June 30, 1980 or, in the alternative, to grant it permission to appeal the Order pursuant to 28 U.S.C. § 1292(b). On October 15, 1980 the Court denied defendant's motion. The Court held that it was proper for it to examine whether the arbitrator went beyond the issue submitted to him, *citing Communications Workers v. Western Electric Co., Inc., supra.*

The arbitrator, on March 4, 1981, issued a supplemental opinion and award, as directed by this Court. The arbitrator concluded that

> Upon complete review of this matter, I hold that the Company's action barring Mason from access to Company property did not "render ineffective" the purposes of the provisions of Article II, Section 2 of the Agreement . . . and that the bar to access to Company premises was not a regulation, "which will render ineffective the purpose of" Article II, Section 2.

Now the case is before the Court on the parties' cross-motions for summary judgment. This Court has jurisdiction under Section 301 of the Labor-Management Relations Act, as amended, 29 U.S.C. §185, to entertain suits for the enforcement of arbitration awards.

The material facts are not in dispute. The parties agree the sole question is whether this Court should enforce the arbitrator's award. The role of this Court in reviewing

arbitration awards is limited. The Court is not to review the merits of the award, including findings of fact and construction and application of the collective bargaining agreement. *See United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960) (the Steelworkers Trilogy); *Western Electric, supra.* Otherwise, the policy of submitting disputes to arbitration would be frustrated.

However, the courts have fashioned a few exceptions to the finality of arbitration awards. In *Enterprise Wheel, supra*, the Supreme Court stated that the arbitration award "is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." 363 U.S. at 597. Thus, a court may consider whether, as this Court did in its Order of June 30, 1980, an arbitrator has exceeded the authority conferred upon him by a collective bargaining agreement. *Western Electric, supra.* In the case at bar, the parties' collective bargaining agreement provides, *inter alia*, that [t]he arbitrator shall not have the authority to amend or modify [the agreement] or to establish new terms and conditions . . ." Agreement at Art. III, Sec. 5.

On remand, the arbitrator found the Company's bar of Mr. Mason not to have rendered ineffective the purpose of Art. II, Sec. 2 because other business representatives continued to have access to the Company's premises. However, this holding is premised on his earlier determination that the Company did not violate Art. II, Sec. 2 because it was justified in "rescind[ing] the right to access

as it applied to Mason . . ." Supplemental Award at p. 5. This analysis is in direct contravention of this Court's earlier ruling that "[t]he issue which was before the arbitrator was not whether the Company was justified in barring Mr. Mason from its property." In other words, the arbitrator should have considered whether Art. II, Sec. 2 gives the Company the right to bar access to its premises to a business representative, without regard to the arguments the Company might put forth to justify its action.

The Court recognizes the Company's legitimate interests in protecting its personnel from physical attacks and its operations from disruptive behavior. "However much this Court might sympathize with this feeling [, that the Company's action was justified,] the arbitrator 'does not sit to dispense his own brand of industrial justice.' " *Western Electric, supra,* at 1323. His authority was limited to deciding the issues submitted to him. Thus, in considering whether the Company was justified in its action he went beyond his authority and this Court has no choice but to refuse enforcement of the award. *Enterprise Wheel, supra,* at 597; *Western Electric, supra,* at 1323.

The Court notes that Art. II, Sec. 2 gives the Company the authority to make rules to govern the right of access by Union personnel. Therefore, it cannot be said that the Company is left without a remedy. It can adopt regulations to protect its legitimate concerns by providing for lesser sanctions than a bar, thereby also safeguarding the Union's right of access. In this regard, the Court finds the arbitrator's holding that by barring Mr. Mason the Company did not regulate his right of access to the premises to be "without foundation in reason or fact." *Machin-*

ists District No. 145 v. Modern Air Transport, Inc., 495 F.2d 1241, 1244 (5th Cir.), *cert. denied* 419 U.S. 1050 (1974); *Boise Cascade v. United Steelworkers*, 588 F.2d 127 (5th Cir.), *cert. denied*, ___U.S.___, 100 S.Ct. 57 (1979). Common sense dictates that the withdrawal of the right of access is the ultimate regulation of access.

In *Boise Cascade, supra*, at 129-30, the Court held that an arbitrator can consider extrinsic evidence "to explain an agreement that may rationally be considered ambiguous." In that case the arbitrator made a finding that the agreement was ambiguous; thus, requiring extrinsic evidence such as the practices of the industry and the shop. *Id.* To the contrary, in this case, the arbitrator made no finding of ambiguity. Therefore, his duty was to interpret the express language of Art. II, Sec. 2, which states that "[*b*]*usiness* [*r*]*epresentatives . . . shall have access* to the" Company's premises, without reliance on extraneous evidence.

Notwithstanding the clear contractual language, the arbitrator held that Mr. Mason "breached the *implicit* obligation for proper conduct, upon which the right of access . . . is contingent . . ." Supplemental Award at p. 4. To make this finding, the arbitrator impermissibly added terms which the parties did not place in the contract. Defendant argues this departure by the arbitrator from the plain terms of the contract is the classic "law of the shop" contractual analysis. However, that argument fails where there has been no finding of ambiguous language on the part of the arbitrator. Furthermore, assuming that evidence of prior custom and practice between the parties was admissible, the record shows a stormy relationship and excessive conduct by representatives of both parties, which had been tolerated (albeit

with many mutual protestations) by the parties for many years. *See* Transcript of Arbitration Proceeding, Vol. II, at pp. 100-102.

In conclusion, even if the arbitrator were allowed to consider extraneous evidence, the custom and practice of the plant and the law of the shop did not show a regular practice of ousting business representatives from the premises for excessive behavior. To the contrary, it showed toleration and even condonation of excessive behavior by both parties over the years.

Contrary to defendant's arguments, this case is distinguishable from *United Food & Commercial Workers International, AFL-CIO, Local Union No. 634 v. Gold Star Sausage Co.*, 487 F.Supp. 596 (D. Co. 1980); *Johnson Bronze Co. v. International Union of United Automobile Aerospace and Agricultural Implement Workers of America, AFL-CIO*, 621 F.2d 81 (3d Cir. 1980); and *F.W.Woolworth Co. v. Miscellaneous Warehousemen's Union, Local No. 781*, 629 F.2d 1204 (7th Cir. 1980), *cert. denied*, ___ U.S.___, 101 S.Ct. 2016 (1981).

In *Gold Star Sausage, supra*, the Court affirmed the arbitrator's determination that a "just-cause" clause, for the discharge of an employee, could be implied in the parties' collective bargaining agreement. 487 F.Supp. at 599. However, in so doing, the Court stated that there was no direct reference in the agreement to the Company's power to discharge with or without just cause. *Id.* In light of this, and other limitations on the Company's right to discharge, the Court held it was possible to infer that the parties contemplated that any discharge would be for cause. *Id.* In the case at bar, the language in Art. II, Sec. 2 makes it clear business representatives shall have access and that any regulations are not to defeat

this right of access. Given the absence of any regulations, prior to this action, the arbitrator could not *ex post facto* imply such a regulation which clearly defeats the right of access. A proper regulation might provide for a lesser sanction than a total bar of Mr. Mason in this case.

In *Johnson Bronze, supra,* the Court found it proper for the arbitrator to impose a reasonableness requirement on the Company's decision to recall laid off employees, when the agreement provided that "[w]hen in the opinion of the Company business requirements necessitate a recall of those employees laid off . . ." they shall be recalled. 621 F.2d at 82. The Court reasoned that to hold otherwise would be to render the Company's opinion "final and absolute without any recourse by the Union through arbitration and without regard to whether or not the Company's opinion is reasonable." *Id.* at 83. The Court felt this was not the intent of the parties. In the present case, as already discussed, to allow the Company to bar a business representative's access to its premises would patently defeat the clear intent of the parties, as expressed in Art. II, Sec. 2.

Finally, in *Woolworth* the Court found it proper for the arbitrator, when confronted with contractual provisions somewhat contradictory, to interpret them and resolve the ambiguity with the aid of extraneous evidence. *Id.* at 1216. This ruling is consistent with *Boise Cascade, supra,* where, unlike here, the arbitrator did find ambiguities requiring him to go beyond the language of the agreement.

In summary, for the reasons set forth herein, the Court GRANTS plaintiff's motion for summary judgment and DENIES defendant's motion for summary judgment.

The arbitrator's award is VACATED.[1]

IT IS SO ORDERED, this 11th day of September, 1981.

/s/ MARVIN H. SHOOB

MARVIN H. SHOOB, Judge
United States District Court
Northern District of Georgia

[1] Given that this case arises out of an incident, in April 29, 1977, where Mr. Mason struck a Company representative in the stomach with his left elbow when the representative walked behind Mr. Mason, the Court is of the opinion that this matter should have been resolved long ago in an informal setting. The parties failure to do so has resulted in over four years of litigation, before the arbitrator and this Court, with the accompanying delay and expense to everyone concerned.

APPENDIX H

[Filed in Clerk's Office U.S.D.C.—Atlanta
October 6, 1981. Ben H. Carter, Clerk.
By: S. Holloway, Deputy Clerk]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

AERONAUTICAL MACHINISTS LODGE 709, IAM&AW, AFL-CIO, *Plaintiff*, v. LOCKHEED-GEORGIA COMPANY, division of LOCKHEED AIRCRAFT CORPORATION, *Defendant.*	CIVIL ACTION C79-1085A

ORDER

This case is before the Court on plaintiff's motion to amend this Court's order of September 11, 1981, to compel defendant to grant access to its facilities to Mr. Mason, and to enter final judgment in its favor. On September 21, 1981, before the above motions were submitted to the Court, the Court issued an order directing the clerk to enter final judgment for plaintiff on its claim and on defendant's counterclaim. The clerk entered judgment on September 21, 1981.

As stated in the order of September 11, 1981,

> [t]he role of this Court in reviewing arbitration awards is limited. The Court is not to review the merits of the award, including findings of fact and construction and application of the collective bargaining agreement.

(Citations omitted.) The Court finds that to provide the

relief sought by plaintiff would be a decision on the merits and thus beyond the jurisdiction of the Court.

In *International A.M.&A.W.D. 145 v. Modern Air Transport*, 495 F.2d 1241, 1244-45 (5th Cir. 1974) the Fifth Circuit held that if a court finds that the arbitrator has exceeded his authority, as this Court found, it cannot then go on to interpret the contract. Instead, the proper course would be to deny enforcement of the award, as this Court did in its order vacating the arbitrator's award. On the other hand, if the Court were to order defendant to allow Mr. Mason into its facilities, it would be ruling on the contract dispute contrary to the long established federal policy of submitting labor disputes to binding arbitration. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960) (The Steelworkers Trilogy).

Accordingly, the Court DENIES plaintiff's motion to amend this Court's order of September 11, 1981.

IT IS SO ORDERED, this 6th day of October, 1981.

/s/ MARVIN H. SHOOB

MARVIN H. SHOOB, Judge
United States District Court
Northern District of Georgia

APPENDIX I

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NOS. 81-7772
81-7918

AERONAUTICAL MACHINISTS LODGE 709
IAM&AW, AFL-CIO,
Plaintiff-Appellee and
Cross-Appellant,

v.

LOCKHEED-GEORGIA COMPANY, DIV.
OF LOCKHEED CORPORATION,
Defendant-Appellant.

Appeal and Cross-Appeal from a
Judgment of the United States District Court
for the Northern District of Georgia

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC OF MACHINISTS LODGE 709

J. R. GOLDTHWAITE, JR., ESQ.
ADAIR & GOLDTHWAITE, P.C.
777 West Peachtree Street, N.E.
Atlanta, Georgia 30308
(404) 876-7100

Attorney for Lodge 709

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

AERONAUTICAL MACHINISTS LODGE 709, IAM & AW, AFL-CIO, *Plaintiff-Appellee,*	CASE NOS.
v.	
LOCKHEED-GEORGIA COMPANY, division OF LOCKHEED CORPORATION, *Defendant-Appellant.*	81-7772 81-7918

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

CERTIFICATE REQUIRED BY ELEVENTH CIRCUIT RULE 22(f)(2)

The undersigned, counsel of record for Plaintiff-Appellee, certifies that the following is a list of attorneys, persons, associations of persons, firms, partnerships or corporations that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates and parent corporations, and other identifiable legal entities related to a party:

I. Aeronautical Machinists Lodge 709, International Association of Machinists and Aerospace Workers, AFL-CIO – Plaintiff-Appellee

II. R. P. Mason – Business Representative of Plaintiff-Appellee

III. Lockheed Corporation, Defendant-Appellant, Subsidiaries and Affiliated Companies.

IV. Kilpatrick & Cody and affiliated attorneys.

V. Undersigned Counsel.

/s/ J. R. GOLDTHWAITE, JR.

J. R. GOLDTHWAITE, JR.
ADAIR & GOLDTHWAITE, P.C.
777 West Peachtree Street, N.E.
Atlanta, Georgia 30308

Rule 26(f)(2) Statement

Counsel for the union expresses a belief, based upon a reasoned and professional judgment, that the panel decision is contrary to decisions of the Supreme Court of the United States and precedents of this Circuit (and the Fifth Circuit) and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court:

1. The standard for the award of attorney fees which has been adopted by the Fifth and Eleventh Circuits, as expressed in the panel decision (Appendix, *infra*), is improper and requires clarification and restatement for the guidance of the courts of this circuit:

> *Summit Valley Industries v. Carpenters Local Union 112*, ___ U.S. ___, 50 U.S.L.W. 4560 (#81-497, 6/1/82).

2. The panel decision improperly interprets and applies "the law of the shop".

> *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

3. The panel decision improperly interprets and applies the role of the courts in reviewing an arbitration decision.

> *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960);
>
> *Alabama Education Association v. Alabama Professional Staff Org.*, 655 F.2d 607, 609 (5th Cir., Unit B, 1981);
>
> *Communications Workers of America v. Western Electric Co., Inc.*, 558 F.2d 816 (5th Cir., 1977), affirming 397 F. Supp. 1318 (N.D. Ga.);
>
> *Brotherhood of Railroad Trainmen v. Central of Geor-*

gia Ry., 415 F.2d 403, 412 (5th Cir., 1969) cert. den. 396 U.S. 1008 (1970);

W. R. Grace & Co. v. Rubberworkers Union, 652 F.2d 1248 (5th Cir., Unit A, 8/10/81, reh'ng den. 9/28/81, cert. granted, 50 U.S.L.W. 3998.09, 6/28/82);

/s/ J. R. GOLDTHWAITE, JR.
Attorney for Plaintiff-Appellee

TABLE OF CONTENTS

Page

Certificate of Interested Persons 2i
Statement of Counsel per Local Rule 26(f)(2) 4i
Table of Contents 6i
Table of Authorities 7i
Issues on Rehearing and for En Banc Consideration .. 8i
Statement of the Case 9i
Statement of Facts 10i
Errors Which Require Rehearing and Correction 19i
1. Law of the Shop 19i
2. Role of the Court 20i
3. Standard for Award of Fees 23i
4. Affirmative Relief 24i
Conclusion 25i
*Certificate of Service
*Attached Appendix—Panel Opinion
*Separate Appendix—Record Excerpts

---

* Omitted from this Appendix because relevant portions are printed elsewhere.

TABLE OF AUTHORITIES

Alabama Education Association v. Alabama Professional Staff Org., 655 F.2d 607, 609 (5th Cir., Unit B, 1981);

Brotherhood of Railroad Trainmen v. Central of Georgia Ry., 415 F.2d 403, 412 (5th Cir., 1969) cert. den. 396 U.S. 1008 (1970);

Communications Workers of America v. Western Electric Co., Inc., 558 F.2d 816 (5th Cir., 1977), affirming 397 F. Supp. 1318 (N.D. Ga.);

Summit Valley Industries v. Carpenters Local Union 112, ___ U.S. ___, 50 U.S.L.W. 4560 (#81-497, 6/1/82).

United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 597 (1960);

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960);

W. R. Grace & Co. v. Rubberworkers Union, 652 F.2d 1248 (5th Cir., Unit A, 8/10/81, reh'ng den. 9/28/81, cert. granted, 50 U.S.L.W. 3998.09, 6/28/82);

Petition for Rehearing
and
Petition for Rehearing
En Banc
of Aeronautical Machinists
Lodge 709

I.

Issues on Rehearing

The panel, without benefit of oral argument, entered a *per curiam* reversal of the opinion (twice considered and rendered, see Separate Appendix) and the judgment of the District Court in favor of the Union and remanded the case for consideration of the request of Lockheed that it be awarded attorney fees against the Union.

Both the Union and Lockheed requested oral argument of the case and the decision of the panel manifests a misunderstanding of the case which would probably have been avoided if oral argument had been granted. The misconceptions of the panel are manifested in the factors which controlled its decision in the case, to-wit:

1. That the District Court had redefined the issue to be decided by the arbitrator. This conclusion is unauthorized and the panel's interpretation of the role of the court merits *en banc* correction.

2. That the District Court had made a decision on the merits reversing the arbitrator's application of "the law of the shop". This conclusion is unauthorized and the panel interpretation merits *en banc* correction.

3. That the Union may have attacked the arbitrator's decisions "without justification" so that remand to the District Court for consideration of award of attorney fees to Lockheed is appropriate. This conclusion is unautho-

rized and evidences a misconception of the facts and authorizes the award of attorneys' fees upon an improper standard which requires en banc correction.

Upon reconsideration, the Court should uphold the Union's appeal from the failure of the District Court to grant affirmative relief.

Statement of the Case

Lodge 709 brought this action to set aside the award of an arbitrator which departed from the plain terms of the collective bargaining agreement and "administered his own brand of industrial justice" contrary to the dictates of the Supreme Court in *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1970). The arbitrator had upheld the action of Lockheed which barred Union Business Representative R. P. Mason from access to all Lockheed controlled premises.

The complaint prayed that the award of the arbitrator be set aside, that a new arbitration be ordered "or that plaintiff's grievance be upheld by the Court, and for such other relief as may be proper." Separate appendix, record excerpts, p. 6.

Both plaintiff Union and defendant Lockheed filed motions for summary judgment. The Union filed the entire proceedings before the arbitrator as exhibits to its motion. (Record Vol. 2, p. 96 and volumes 3 and 4 of record).[1]

The District Court set aside the arbitration award and remanded the case to the arbitrator for further consideration in accordance with its opinion. (R. Vol. 1, p. 208, Sep. App. 208).

---

[1] Record references use volume numbers as given for No. 81-7772.

On remand the arbitrator reaffirmed his previous decision, contrary to the law of the contract found by the District Court; and Lodge 709 objected to the Supplemental Award and asked that it be vacated and set aside because the arbitrator had again failed to uphold the plain terms of the Agreement and had again administered his own brand of industrial justice. In its objections to the Supplemental Award, the Union asked for affirmative relief. (R. Vol. 1, pp. 261-262).

The Court again set aside the Arbitrator's award but failed to grant affirmative relief. (R. Vol. 1, p. 353, sep. app. 353).

Lodge 709 filed a motion that the Court's opinion and order be amended to grant affirmative relief, directing Lockheed to permit access to its premises by Business Representative Mason. (R. Vol. 1, pp. 362, 363).

The District Court held that it did not have authority to enforce the provisions of the collective bargaining agreement. (Supplemental Record, Vol. 1, pp. 16, 17, sep. app. index 10, p.16).

Lockheed appealed from the judgment setting aside the Arbitrator's supplemental award (Supplemental Record, Vol. 1, p. 26) and the Union appealed from the denial of affirmative relief (Supplemental Record, Vol. 1, p. 22).

Statement of Facts

The collective bargaining agreement between Lockheed-Georgia Company and Lodge 709 provides that:

> Section 2 – Union Officials and Business Representatives
>
> The President, Vice-President and Business Representatives of the Union shall have access to the Labor Relations Department Office for the purpose of con-

tacting Labor Relations personnel *and shall have access to the departments of the Company's plant to which they are assigned* for the sole purpose of contacting the Union Steward or Committeeman concerning employee complaints or grievances or matters arising out of the application of this Agreement. Such visits shall be subject to such regulations as may be made from time to time by the Company. *The Company shall not impose regulations which will render ineffective the purposes of this Section.* Before entering the Company's plant for the above purpose, the President, Vice-President, or a Business Representative shall notify the Labor Relations Department of the date and time he will be in the plant, and the name of the Union Steward or Committeeman he will contact.

The President, Vice-President or Business Representative shall not discuss any problem with employees (other than the Steward and Committeeman) or with the supervision of any department. (Contract, Part B, Art. II, Sec. 2, p. 28, emphasis supplied; R. Vol. 3, p. 159).

Business Agent Mason became involved in a dispute with a department manager while on Lockheed premises. Lockheed contended that Mason had assaulted a supervisor in the manager's office, which Mason denied.

Rather than file a grievance that Mason had violated the last paragraph of the above quoted contractual provisions, Lockheed barred Mason from all access to its premises. Notwithstanding its vast personnel and security resources, Lockheed took no intermediate action, nor promulgated any intermediate "regulations" but elected to bar Mason altogether from all "Lockheed controlled property." [2]

---

[2] See R. Vol. 3: Union President Reeves Bowen testified in the arbitration proceedings, *without any contradiction*, that: "A sizeable

The Union filed a grievance asserting that Lockheed had violated the above quoted provisions by barring Mason altogether from Lockheed premises, thereby preventing him from performing his assigned duties, rather than adopt reasonable intermediate regulations to prevent the alleged, and denied, abuse of management personnel. (R. Vol. 3, p. 160).

The Arbitrator ruled in favor of Lockheed finding an implied "rule of reasonableness" which was "implicit" but was *not* written or stated anywhere in the collective bargaining agreement. (Sep. App., Record Excerpts, p. 17).

The collective bargaining agreement, on the other hand, provides explicitly that:

> The Arbitrator *shall not* have the authority to amend or modify this Agreement or to establish new terms and conditions of this Agreement.

(Lockheed's Record Excerpts, p. 7).

In its first opinion, the District Court found and ruled:

> This Court may also consider whether an arbitrator

---

portion of our relationship with the Company is confrontation." [Arb. Transcript, Vol. II, page 102.] "A lot of it is trench warfare." [Arb. Transcript, Vol. II, p. 102.] "It's rare that a month goes by without [the Company contacting] me with a claim of misconduct * * * they have a very high rate of complaints on business representatives. * * * they have a stack of paperwork on [Business Representative John Kendrick] * * * about that high (indicating), maybe a foot off the table. * * * Also, they have mentioned that they have a stack of paperwork on [Business Representative] Gerald Brown * * * so high (indicating) * * * six inches off the table. * * * they claim we've made complaints to them about business representatives being bumped around by management people. * * * We've made complaints about abuse, more often the people we represent and the business representatives themselves, of course. * * * I've been threatened more than once with having the guard walk me out." [Arb. Transcript, Vol. II, pp. 100-101].

has exceeded the authority conferred upon him by a collective bargaining agreement:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look to guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

United Steelworkers v. Enterprise Wheel and Car Corp., supra,[3] at 597. An arbitrator may not go beyond interpretation and application of the collective bargaining agreement.

Communication Workers v. Western Electric Co., Inc., supra.[4]

The issue which the parties presented to the arbitrator was whether the Company violated the collective bargaining agreement by permanently barring Mr. Mason from all Lockheed controlled property. The award and opinion indicate that the arbitrator's concern was whether the Company's bar against Mr. Mason's presence on its property was justified. The arbitrator appeared to conclude that if the action was justified it was not a violation of the agreement, and he found that a rule of reasonableness must be used to interpret and apply the provisions of the collective bargaining agreement. His final determination was that the Company's action 'was justified by [Mr. Mason's] misconduct and did not violate the Agreement.'

It appears to this Court that the arbitrator went

---

[3] 363 U.S. 593 (1960).

[4] *Communications Workers of America v. Western Electric Co., Inc.*, 558 F.2d 876 (5th Cir. 1977), aff'g 397 F.Supp. 1318 (N.D. Ga. 1975).

> beyond the issue submitted to him in making his determination. The issue which was before the arbitrator was not whether the Company was justified in barring Mr. Mason from its property. It was instead whether the Company's action rendered ineffective the purposes of the provision of the collective bargaining agreement which allowed Mr. Mason access to property of the Company for the purpose of performing his job as business representative (hereinafter referred to as 'the business representative provision'). If the arbitrator had found that the Company's action did render ineffective the purposes of that provision, he would have been required to conclude that the Company violated the agreement according to its terms, no matter how justified he might have found that violation to be. The parties have agreed that the Company *shall not* render ineffective the purposes of business representative provision. *See Communication Workers v. Western Electric Co., Inc., supra.*
>
> The arbitrator noted that Mr. Mason's ability to fully perform his job as a business representative has been hampered to some degree by his lack of access to the plant, but this Court feels that the opinion does not focus on whether the Company's action *renders ineffective* the business representative provision in violation of the agreement. Accordingly, this matter is REMANDED to the arbitrator for clarification or for additional findings on that issue.

After "complete review of this matter" on remand, the arbitrator reiterated his earlier holding notwithstanding the admonitions of the District Court. He said:

> While not explicitly stated in Article II, Section 2 of the Agreement, it is *implicit* in those provisions that the right of access granted to Union Business Representatives is contingent upon their conducting themselves in a manner which is consistent with the purposes for which access has been granted, * * * (em-

phasis supplied, Sep. App., Record Excerpts, Entry 8; R. Vol. 1, p. 314 *et seq.*)

Section 2 of the Agreement is to facilitate the Business Representatives' performance of specified duties by allowing them access to the Labor Relations Department Office and their assigned plant departments for the performance of specified tasks. *The Company's action rendered the purpose ineffective as to Mason,* as an individual Business Representative, but the general purpose of the provision was not rendered ineffective when Mason was barred since all other Business Representatives continued to have access to the plant. Article II, Section 2 specifically provides that the Company may regulate visits by Business Representatives to the Labor Relations Department Office and their assigned departments and that the 'Company shall not impose regulations which will render ineffective the purpose of this Section.' The 'regulations' provided for refer to rules or restrictions on the manner in which plant visits are to be made. By barring Mason from Company premises, the Company did not regulate *visits* made under Article II, Section 2, but rescinded Mason's *right* to access and the Union's right to have Mason granted access to plant premises, based on the implicit contractual authority which arose from Mason's persistent and outrageous breach of the obligation for proper conduct. Thus, the bar to Mason's entry was not a regulation on plant visits which rendered the purpose of Article II, Section 2 ineffective, and the Company did not violate Article II, Section 2 by imposing the bar. [Id., Entry 8, R. Vol. 1, p. 314, emphasis supplied.)

Upon the Union's Objections to Confirmation of the arbitrator's Supplemental Opinion, the District Court held:

However, the courts have fashioned a few exceptions to the finality of arbitration awards. In *Enterprise*

Wheel, supra, the Supreme Court stated that the arbitration award 'is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.' 363 U.S. at 597. Thus, a court may consider whether, as this Court did in its Order of June 30, 1980, an arbitrator has exceeded the authority conferred upon him by a collective bargaining agreement. *Western Electric, supra*. In the case at bar, the parties' collective bargaining agreement provides, *inter alia*, that '[t]he arbitrator shall not have the authority to amend or modify [the agreement] or to establish new terms and conditions . . .' Agreement at Art. III, Sec. 5.

On remand, the arbitrator found the Company's bar of Mr. Mason not to have rendered ineffective the purpose of Art. II, Sec. 2 because other business representatives continued to have access to the Company's premises. However, this holding is premised on his earlier determination that the Company did not violate Art. II, Sec. 2 because it was justified in 'rescind[ing] the right to access as it applied to Mason . . .' Supplemental Award at p. 5. This analysis is in direct contravention of this Court's earlier ruling that '[t]he issue which was before the arbitrator was not whether the Company was justified in barring Mr. Mason from its property.' In other words, the arbitrator should have considered whether Art. II, Sec. 2 gives the Company the right to bar access to its premises to a business representative, without regard to the arguments the Company might put forth to justify its action.

The Court recognizes the Company's legitimate interests in protecting its personnel from physical attacks and its operations from disruptive behavior. 'However much this Court might sympathize with this feeling [, that the Company's action was justified,] the arbitrator 'does not sit to dispense his own

brand of industrial justice.' *Western Electric, supra,* at 1323. His authority was limited to deciding the issues submitted to him. Thus, in considering whether the Company was justified in its action he went beyond his authority and this Court has no choice but to refuse enforcement of the award. *Enterprise Wheel, supra,* at 597; *Western Electric, supra,* at 1323.

The Court notes that Art. II, Sec. 2 gives the Company the authority to make rules to govern the right of access by Union personnel. Therefore, it cannot be said that the Company is left without a remedy. It can adopt regulations to protect its legitimate concerns by providing for lesser sanctions than a bar, thereby also safeguarding the Union's right of access. In this regard, the Court finds the arbitrator's holding that by barring Mr. Mason the Company did not regulate his right of access to the premises to be 'without foundation in reason or fact.' *Machinists District No. 145 v. Modern Air Transport, Inc.,* 495 F.2d 1241, 1244 (5th Cir.), *cert. denied* 419 U.S. 1050 (1974); *Boise Cascade v. United Steelworkers,* 588 F.2d 127 (5th Cir.), *cert. denied,* ___ U.S. ___, 100 S.Ct. 57 (1979). Common sense dictates that the withdrawal of the right of access is the ultimate regulation of access.

In *Boise Cascade, supra,* at 129-30, the Court held that an arbitrator can consider extrinsic evidence 'to explain an agreement that may rationally be considered ambiguous.' In that case the arbitrator made a finding that the agreement was ambiguous; thus, requiring extrinsic evidence such as the practices of the industry and the shop. *Id.* To the contrary, in this case, the arbitrator made no finding of ambiguity. Therefore, his duty was to interpret the express language of Art. II, Sec. 2, which states that '*[b]usiness [r]epresentatives . . . shall have access* to the' Company's premises, without reliance on extraneous evidence.

> Notwithstanding the clear contractual language, the arbitrator held that Mr. Mason 'breached the *implicit* obligation for proper conduct, upon which the right of access . . . is contingent . . .' Supplemental Award at p. 4. To make this finding, the arbitrator impermissibly added terms which the parties did not place in the contract. Defendant argues this departure by the arbitrator from the plain terms of the contract is the classic 'law of the shop' contractual analysis. However, that argument fails where there has been no finding of ambiguous language on the part of the arbitrator. Furthermore, assuming that evidence of prior custom and practice between the parties was admissible, the record shows a stormy relationship and excessive conduct by representatives of both parties, which had been tolerated (albeit with many mutual protestations) by the parties for many years. *See* Transcript of Arbitration Proceeding, Vol. II, at pp. 100-102.
>
> In conclusion, even if the arbitrator were allowed to consider extraneous evidence, the custom and practice of the plant and the law of the shop did not show a regular practice of ousting business representatives from the premises for excessive behavior. To the contrary, it showed toleration and even condonation of excessive behavior by both parties over the years. (Sep. App., Record Excerpts, Entry 9; R. Vol. 1, pp. 356-359).

By motion to modify, the Union asked the Court to award affirmative relief, ordering Lockheed to grant plant access to Business Representative Mason so that he could perform his duties of employee representation and grievance handling as provided in the contract. The Court denied this motion stating:

> As stated in the order of September 11, 1981, [t]he role of this Court in reviewing arbitration awards is limited. The Court is not to review the merits of the

> award, including findings of fact and construction and application of the collective bargaining agreement. (Citations omitted.) The Court finds that to provide the relief sought by plaintiff would be a decision on the merits and thus beyond the jurisdiction of the Court. (Sep. App., Record Excerpts, Entry 10; Supplemental Record, Vol. 1, p. 16).

The Union appealed from this order.

Errors Which Require Rehearing and Correction

1. Law of the Shop

The "industrial common law" (law of the shop) is defined in *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960) as:

> "the practices of the industry and the shop — is equally a part of the collective bargaining agreement although not expressed in it".

But the Arbitrator in this case *did not* make findings upon *and did not rely* upon "the law of the shop";[5] indeed, he could not because Lockheed did not introduce any evidence to support a finding that by custom and practice (common law of the shop) it had ever excluded any union representative from its premises *for any cause.* To the contrary the only evidence about the "common law of the shop" was that introduced by the Union (fn. 2, *supra*) which, as stated by the District Court, showed "a stormy relationship and excessive conduct by both parties, which had been tolerated (albeit with many mutual protestations) by the parties for many years. (See quoted opinion, p. 9, *supra*).

---

[5] See District Court opinion, p. 9, *supra.*

This statement by the District Court *was not* a ruling on the merits of the case but was a refutation of Lockheed's contention that the arbitrator had relied upon "the law of the shop"; and was an express finding by the District Court that the Arbitrator impermissibly "added terms to the contract" and supplied "his own brand of industrial justice" and that the Arbitrator did not rest his opinion upon the "law of the shop".

The panel opinion incorrectly interprets this statement of the District Court and reversal on this ground was improper.

2. The Panel Improperly Interpreted and Applied the Role of the Court in Reviewing an Arbitrator's Award.

The arbitrator found that the issue submitted to him was "whether or not the Company violated the agreement by permanently barring Business Representative R. P. Mason from all Company-controlled property on May 3, 1977."

The Court said that the issue before the arbitrator was "*not whether* the Company was justified in barring Mr. Mason from its property" [as the arbitrator had concluded],[6] but was "whether the Company's action [violated the contract in that it] rendered ineffective the purposes of the provision of the collective bargaining agreement which allowed Mr. Mason access to property of the Company for the purpose of performing his job as business representative."

Thus, the District Court *did not*, as concluded by the panel decision, *change* the issue to be decided by the ar-

---

[6] This *was not* a discharge case where an issue of "proper cause" would have given the arbitrator latitude for that conclusion.

bitrator; but held that the arbitrator *had departed from* the issue which was submitted to him and that the arbitrator departed from the terms of the agreement and administered his own brand of industrial justice. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) quoted in court opinion, p. 5, *supra.*

In *Brotherhood of Railroad Trainmen v. Central of Ga. Ry.*, 415 F.2d 403, 412 (5th Cir. 1969), cert. den. 396 U.S. 1008 (1970), the Fifth Circuit restated the limitations upon an arbitrator's power, as follows:

> The arbitrator's role is to carry out the aims of the agreement, and his role defines the scope of his authority. When he is no longer carrying out the agreement or when his position cannot be considered in anyway rational, he has exceeded his jurisdiction. 415 F.2d, at 412.

In *Communications Workers of America v. Western Electric Co., Inc.*, 558 F. 2d 816 (5th Cir. 1977), the Court adopted the decision of Judge James Hill, now of this Court, 397 F. Supp. 1318, which held:

> The Court must then look to the words of the arbitrator and determine if his award 'draws its essence from the collective bargaining agreement.' *Enterprise Corp., supra,* at 597.
>
> * * *
>
> However, the Court is of the opinion that the manifest words of the arbitrator clearly show that he did not confine himself to interpretation and application of the collective bargaining agreement, but instead took it upon himself to dispense his own brand of industrial justice. Therefore, the enforcement of the award must be denied.
>
> * * * Where the provisions of a collective bargaining agreement are not in clear, plain, exact and unambiguous terms, an arbitrator has wide latitude in

> interpreting the agreement. [Citations omitted.] However, in the instant case the provisions of the agreement could hardly be more clear.

Similarly, in *Alabama Education Association v. Alabama Professional Staff Org.*, 655 F.2d 607, 609 (5th Cir., Unit B, 1981), this Court said:

> On its face the award should ordinarily reveal that it finds its source in the contract and those circumstances out of which comes the 'common law of the shop.' *Safeway Stores v. American Bakery and Confectionery Workers International Union, Local 111, supra.*[6]

The decision in *W. R. Grace Co. v. Rubberworkers Union*, 652 F.2d 1248 (5th Cir., Unit A, 8/10/81, reh'ng. den. 9/28/81, cert. granted 50 U.S.L.W. 3998.09, 6/28/82) [7] is substantially on all fours with this case. There the arbitrator departed from the contract and administered his own brand of justice, which was condemned by the Fifth Circuit, Unit A; and the panel decision here fails to follow that binding precedent. Since that case is before the Supreme Court, it is appropriate that an *en banc* decision be rendered in this case, after the Supreme Court has ruled, for the guidance of Eleventh Circuit courts.

The District Court correctly found that the arbitrator had departed from the agreement as made by the parties and, hence, the award was unenforceable. The panel erred in departing from the established precedent which the District Court properly applied.

---

[6] 390 F.2d 79 (5th Cir., 1968).

[7] It is our understanding that the issue on certiorari is whether back pay should be tolled during the period when the employer was abiding for a court decision and that the question of the arbitrator's departure from the contract, condemned by the 5th Circuit, is not under direct review.

3. Standard for Award of Attorney Fees

The panel held that attorney fees may be awarded against the union if the District Court finds that the Union refused to abide by the arbitrator's award "without justification". This standard is improper and must be revised. Furthermore the Union has abided by the arbitrator's award *pendente lite* and has done nothing more than challenge the impropriety of the award by legal action, which is its right to do without liability for attorney fees.

In *Summit Valley Industries v. Carpenters Local Union 112*, 50 U.S.L.W. 4560 (#81-497, 6/1/82), the Supreme Court said:

> Under the American Rule it is well-established that attorney's fees "are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." *Fleischman Distrilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967). This Court has endorsed certain exceptions to this rule where necessary to further the interests of justice. See, *e.g.*, *Vaughan v. Atkinson*, 396 U.S. 527 (1962) (bad faith); *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923) (willful disobediance of a court order); *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885) (common fund). In the absence of one of these equitable exceptions, however, the rule has been consistently followed for almost 200 years. See *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 249-250 (1975); *Arcambel v. Wiseman*, 3 Dall. 306 (1796).
>
> * * *
>
> As we have often noted, one of the primary justifications for the American Rule is that "one should not be penalized for merely defending or prosecuting a lawsuit." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967) (emphasis added). See

also, *F. D. Rich Co. v. United States ex rel Industrial Lumber Co.*, 417 U.S. 116, 129 (1974); *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 235 (1964).

50 U.S.L.W. at 4561 (emphasis by the Court).

The standard of "without justification" established by the cases followed by the panel is broader than "bad faith", and is therefore improper unless the full Court, by express decision, equates those terms.

Furthermore, the Union has complied with the arbitrator's decision. Representative Mason has not been on Lockheed premises since he was barred by Lockheed on May 3, 1977. All the Union has done is to litigate the propriety of the arbitrator's decision. Under the American Rule, the Union is entitled to do that without liability for attorney fees. Cf. *W. R. Grace & Co., v. Rubberworkers, supra*, 652 F.2d at 1258-1259. Hence the panel decision of remand for fee award was unauthorized.

The full Court should issue a corrective rule concerning the standard for the award of attorney fees which conforms to the American Rule.

4. Affirmative Relief

The Union's appeal for affirmative relief has been briefed and will be addressed further if rehearing is granted.

Conclusion

For the reasons urged, rehearing should be granted by the full court.

Respectfully submitted,

/s/ J. R. GOLDTHWAITE, JR.
J. R. GOLDTHWAITE, JR.

ADAIR & GOLDTHWAITE, P.C.
777 West Peachtree Street, N.E.
Atlanta, Georgia 30308
(404) 876-7100

* * *

APPENDIX J

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NOS. 81-7772
81-7918

AERONAUTICAL MACHINISTS LODGE 709
IAM&AW, AFL-CIO,

Plaintiff-Appellee and Cross-Appellant,

v.

LOCKHEED-GEORGIA COMPANY, DIV.
OF LOCKHEED CORPORATION,

Defendant-Appellant.

Appeal and Cross-Appeal from a Judgment of the United States District Court for the Northern District of Georgia

---

Pending on
Petition for Rehearing
and
Petition for Rehearing En Banc

REQUEST OF MACHINISTS LODGE 709 THAT JUDGE ALBERT HENDERSON RECUSE HIMSELF FROM FURTHER PARTICIPATION

J. R. GOLDTHWAITE, JR., ESQ.
ADAIR & GOLDTHWAITE, P.C.
777 West Peachtree Street, N. E.
Atlanta, Georgia 30308
(404) 876-7100
Attorney for Lodge 709

To the Chief Judge and the Judges of the United States Court of Appeals for the Eleventh Circuit:

Aeronautical Machinists Lodge 709 requests that Judge Albert Henderson recuse himself from further participation in the decisional processes in this case, and, if *en banc* rehearing is *not* granted, that a substitute be appointed to replace Judge Henderson on the panel.

Judge Henderson is *not* legally disqualified from participating in the decisional process in this case. See *Adams v. United States*, 302 F.2d 307 (5th Cir., 1962), copy of decision attached. See also *Laird v. Tatum* 409 U.S. 824 (1972); *United States v. Seiffert*, 501 F.2d 974 (5th Cir., 1974); and *Antonello v. Wunsch*, 500 F.2d 1260, 1262 (10th Cir., 1974).

However, as Judge John Brown, dissenting in *Adams*, 302 F.2d, at 310, said:

> . . . the administration of justice requires not only that the proceedings be proper, but that they *appear* to be . . . (emphasis by Judge Brown).

Before Judge Henderson became a Superior Court Judge of Georgia, he represented the Lockheed-Georgia Company. One of the cases in which he represented Lockheed was an injunction case against Lodge 709 in which Lockheed contended that the officers and members of Lodge 709 were guilty of strike violence and Judge Henderson aggressively exposed that contention on behalf of Lockheed in seeking injunctive relief.

In the present case, Lockheed (to excuse its violation of the plain terms of the collective bargaining agreement with Lodge 709) relies upon a contention that an officer of Lodge 709 was guilty of violence.

The officers of Lodge 709 have expressed to counsel for

the Lodge an apprehension that Judge Henderson's aggressive representation of Lockheed in the strike injunction proceedings may have impressed upon him an opinion that the officers of Lodge 709 encourage or condone violence and that such an impression may have deprived Lodge 709 of a full measure of impartiality in the consideration of this case.

Oral argument was not afforded in this case, even though both parties requested oral argument, and a *per curiam* decision was entered by the panel. These factors enchance the apprehension of Lodge 709 that it did not receive a full measure of impartiality.

As we have stated in the Petition for Rehearing and Petition for Rehearing *En Banc*, the panel decision, in reversing an able and respected District Judge, fails to follow applicable precedent followed by the District Judge; and also, on the attorney fees issue, the panel opinion adopts a standard, established by the Fifth Circuit, which has been repudiated by the Supreme Court so that a new standard must be adopted by the Eleventh Circuit for the guidance of the courts of the Circuit. This case is therefore an important one which deserves a full measure of impartial consideration.

As Judge Brown said, the question is not whether the proceedings are proper but whether they *appear* to be proper—that is, the litigants, and the public, should not be afforded an opportunity to question whether the proceedings of this Court are proper and impartial.

It is not easy for counsel, who has known and respected Judge Henderson almost since childhood and who has confidence in his ability and his impartiality, to file this request. However, we believe that our duty to this Court and to the respect which is due to its processes, requires

that this request be filed, and the same duty, we believe, requires that Judge Henderson recuse himself from further participation in this case.

Respectfully submitted,

/s/ J. R. GOLDTHWAITE, JR.
J. R. GOLDTHWAITE, JR.

ADAIR & GOLDTHWAITE, P.C.
777 West Peachtree Street, N.E.
Atlanta, Georgia 30308
(404) 876-7100

APPENDIX K

[U.S. Court of Appeals, Eleventh Circuit, filed September 10, 1982; By Norman E. Zoller, Clerk.]

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NOS. 81-7772
81-7918

AERONAUTICAL MACHINISTS LODGE 709 IAM & AW, AFL-CIO,

Plaintiff-Appellee and Cross-Appellant,

vs.

LOCKHEED-GEORGIA COMPANY, DIVISION OF LOCKHEED CORPORATION,

Defendant-Appellant.

On Appeal from the United States District Court For the Northern District of Georgia

---

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

BY THE COURT:

Judge Albert Henderson has notified the court that he adheres to his decision not to recuse himself in this case, and the parties have been notified accordingly. The motion of Aeronautical Machinists Lodge 709 purports to be addressed also to the court but acknowledges on its

face that Judge Henderson is not legally disqualified from participating in the case. There is then no issue for the court to decide and, insofar as the motion of Lodge 709 purports to be addressed to the court, it is STRICKEN.

DONE this the 8th day of September, 1982, with the concurrence of all judges.

/s/ JOHN C. GODBOLD
CHIEF JUDGE

APPENDIX L

U.S. Court of Appeals, Eleventh Circuit, filed September 14, 1982; By Norman E. Zoller, Clerk.]

IN THE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7772 and 81-7918

AERONAUTICAL MACHINISTS LODGE 709, I A M & A W, AFL-CIO,
Plaintiff-Appellee,

versus

LOCKHEED GEORGIA COMPANY, division of LOCKHEAD AIRCRAFT CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion July 21, 1982, 11 Cir., 198__, ___ F.2d ___).
( )

Before TJOFLAT, FAY and HENDERSON, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appel-

late Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ PETER FAY
United States Circuit Judge

REHG-6

APPENDIX M

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NOS. 81-7772
81-7918

AERONAUTICAL MACHINISTS LODGE 709 IAM&AW, AFL-CIO,

Plaintiff-Appellee and Cross-Appellant,

v.

LOCKHEED-GEORGIA COMPANY, DIV. OF LOCKHEED CORPORATION,

Defendant-Appellant.

MOTION TO STAY OR RECALL MANDATE AND RETAIN RECORD

Aeronautical Machinists Lodge 709 respectfully shows that the Order of Court in the above case, filed September 10, 1982, and transmitted September 13, 1982, was received on September 14, 1982 and movant will file petition for certiorari for the review of this Court's decision in the case.

For the purpose of preparation of the petition for certiorari and preparation of appendices, the retention of the record in this Court until action by the Supreme Court will greatly facilitate the the furtherance of the proceedings and is, in fact, necessary because of the difference in rules in this Court and in the District Court*

*The District Court does not permit the original record to be checked out by counsel.

concerning use of the original record in this Court, and use of the original record in this Court is essential.

Movants therefore put themselves upon terms and move that the mandate be withheld or recalled, as may be appropriate, and that the return of the record to the District Court be delayed not less than 90 days from September 10, 1982, and, upon filing of Petition for Certiorari, thereafter until the Supreme Court has acted upon the Petition for Certiorari.

Movants will comply with such terms as the Court may establish as a condition for the grant of the order herein requested.

Respectfully submitted,

/s/ J. R. GOLDTHWAITE, JR.
J. R. GOLDTHWAITE, JR.

ADAIR & GOLDTHWAITE, P.C.
777 West Peachtree Street, N.E.
Atlanta, Georgia 30308
(404) 876-7100

APPENDIX N

[U.S. Court of Appeals, Eleventh Circuit, filed November 3, 1982; By Norman E. Zoller, Clerk.]

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-7772
81-7918

AERONAUTICAL MACHINISTS LODGE 709, IAM&AW, AFL-CIO,

Plaintiff-Appellee, Cross-Appellant,

versus

LOCKHEED GEORGIA COMPANY, a division of LOCKHEED AIRCRAFT CORPORATION,

Defendant-Appellant, Cross-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

---

ORDER:

(✓) The motion of appellee, Aeronautical Machinists Lodge 709 for [X] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of appellee, Aeronautical Machinists Lodge 709 for [X] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in

force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____ _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____, _____ for a further stay of the issuance of the mandate is DENIED.

/s/ PETER FAY
UNITED STATES CIRCUIT JUDGE

MDT-4

APPENDIX O

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7772
81-7918
Non-Argument Calendar

D.C. Docket No. CV79-1085A

AERONAUTICAL MACHINISTS LODGE 709, IAM&AW, AFL-CIO,

Plaintiff-Appellee,

versus

LOCKHEED GEORGIA COMPANY, division of LOCKHEED AIRCRAFT CORPORATION,

Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Georgia

---

Before TJOFLAT, FAY and HENDERSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby REVERSED; and that this cause be, and the

same is hereby, REMANDED to said District Court in accordance with the opinion of this Court;

It is further ordered that plaintiff-appellee pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

July 21, 1982

ISSUED AS MANDATE: November 3, 1982

UNION OFFICE COPY

Aeronautical Machinists Lodge No. 709
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

GRIEVANCE FORM

A-1
GRIEVANCE NO.

Lodge 709

NAME	BADGE NO.		DATE	SIGNATURE
		RECEIVED BY DEPARTMENT HEAD		FOREMAN
PLANT / DEPT. / SHIFT		RETURNED TO SENIOR CHAIRMAN		CHAIRMAN
IMMEDIATE SUPERIOR		SETTLED ☐		FOREMAN
		UNSETTLED ☐		CHAIRMAN
1032 Clay Street, Marietta, Georgia		REC'D BY: BUSINESS REPRESENTATIVE / LABOR RELATIONS		
ADDRESS	HOME PHONE			
CLASSIFICATION / HIRING DATE / PRESENT RATE		L. R. ANS. / INTENT FILED / CLASSIFICATION COMMITTEE / LABOR RELATIONS COMMITTEE / ARBITRATION		

ACTION REQUESTED BY [redacted] THE UNION:

That the Company remove its bar to Business Representative R. P. Mason "from any Lockheed controlled property."

BASIS OF REQUEST:

The action of the Company in this matter was and is contrary to the provisions of the Union-Company Agreement.

Reference: Part B -
Article I, Section 4
Article I, Section 8
Article II, Section 2

[redacted] 5-11-77
SIGNATURE DATE
Lodge 709, President

STATEMENT OF DEPARTMENT

RECEIVED MAY 11 '77 LABOR RELATIONS OFFICE

SIGNATURE OF FOREMAN DATE

APPENDIX Q

PART B – ART. I, SEC. 4

Section 4—Performance Required

The Company and the Union agree that they will administer this Agreement in accordance with the true intent of its terms and provisions and will give each other fullest cooperation to the end that harmonious relations may be maintained in the interest of both the Company and the Union. It shall be the duty of the Company and its representatives and the Union and its representatives to comply with and abide by all the provisions of this Agreement.

Either party hereto shall be entitled to require specific performance of the provisions of this Agreement. Time is the essence of this Agreement.

The waiver of any breach or condition of this Agreement by either party shall not constitute a precedent for any further waiver of such breach or condition.

PART B – ART. I, SEC. 8

Section 8—Strikes and Lockouts

For the duration of this Agreement the Union agrees that it shall not cause or engage in any strike, slowdown, or stoppage of work, and the Company agrees that it shall not cause or engage in any lockout. Either party hereto shall be relieved of this obligation in the event of failure of the other party to comply with an arbitration award made within the authority of this Agreement.

PART B – ART. II, SEC. 2

Section 2—Union Officials and Business Representatives

The President, Vice-President and Business Represen-

tatives of the Union shall have access to the Labor Relations Department Office for the purpose of contacting Labor Relations personnel and shall have access to the departments of the Company's plant to which they are assigned for the sole purpose of contacting the Union Steward or Committeeman concerning employee complaints or grievances or matters arising out of the application of this Agreement. Such visits shall be subject to such regulations as may be made from time to time by the Company. The Company shall not impose regulations which will render ineffective the purpose of this Section. Before entering the Company's plant for the above purpose, the President, Vice-President, or a Business Representative shall notify the Labor Relations Department of the date and time he will be in the plant, and the name of the Union Steward or Committeeman he will contact.

The President, Vice-President or Business Representatives shall not discuss any problem with employees (other than the Steward and Committeeman) or with the supervision of any department.

PART B—ART. III, SEC. 2

Section 2—Union Grievances

The Union may file a grievance with the Company with respect to the application or interpretation of any of the terms or provisions of Part B as follows: Article I (except Sections 1, 6 and 13), Article II, Article V (except Section 1), Section 5 of Article VI, and Sub-Section (2) of Section 1 of Article VIII. Such Union grievance shall be delivered to the Labor Relations office within fifteen (15) working days after the occurrence upon which such grievance is founded, and shall first be discussed by the Union and the Labor Relations office. Within seven (7) working days after receipt of such grievance the Labor

Relations office shall deliver to the Union its answer in writing. If a settlement has not been reached and the Union desires to proceed further with the grievance, the Union within five (5) working days after receipt of such answer shall deliver to the Labor Relations office a written notice that it desires to present the grievance to the Labor Relations Committee.

The grievance shall be scheduled for and heard by the Labor Relations Committee within thirty (30) calendar days from the date of such written notice. If the Committee does not hear a Union grievance which has been scheduled, the time limits herein set forth shall be extended to the time of the next meeting. If that Committee fails to settle the grievance, the Union may proceed in accordance with Section 5 of this Article. Failure of the Union to proceed within the time limits herein set forth shall constitute a waiver of the grievance.

PART B—ART. III, SEC. 5

Section 5—Arbitration

Any grievance which has not been settled pursuant to Sections 1 through 4 of this Article, and which involves the interpretation or application of this Agreement, may be referred to arbitration.

The party seeking arbitration must deliver to the other party written notice of such intent to proceed to arbitration within five (5) working days after the Labor Relations Committee or the Classification Grievance Committee has rendered its decision. Within ten (10) working days from the date of delivery of the notice, an arbitrator shall be selected by mutual agreement, or the parties shall request the Federal Mediation and Conciliation Service to submit a list of five (5) persons from which the

arbitrator shall be chosen. Within five (5) working days following the receipt of such panel from the Federal Mediation and Conciliation Service the parties shall select an arbitrator in the following manner: The Union and the Company shall alternately strike one (1) name from such panel (the right to strike the first name having been determined by lot) until only one (1) name remains and that person shall be the arbitrator.

Upon receipt of acknowledgement by the arbitrator of his willingness to act, the parties shall, within five (5) working days, schedule the arbitration to be heard within the next thirty (30) calendar days. If the arbitrator cannot hear the case within such thirty (30) days, it shall be scheduled at the earliest date thereafter agreeable to the arbitrator, or, by mutual agreement, the parties may agree to select a new arbitrator or request a new panel in accordance with the procedure and within the time limits specified above. Failure by the party seeking arbitration to proceed within any of the time limits herein set forth shall result in a waiver of the grievance.

The parties shall execute a submission agreement. If the parties fail to agree upon a joint submission each party shall submit a separate submission and the arbitrator shall determine the issue or issues to be heard, provided that said issue or issues are arbitrable in accordance with this Section. The joint or the separate submission shall state the issue or issues and the specific clause or clauses of this Agreement which the arbitrator is to interpret or apply.

The arbitrator shall have the authority to interpret and apply the provisions of this Agreement including the

authority to determine under Article VIII, Section 1, (2), a basic rate of pay for a modified or newly established job. The arbitrator shall not have the authority to amend or modify this Agreement or to establish new terms and conditions of this Agreement. The decision of the arbitrator shall be final and binding upon the Company, the Union, and the employee, and shall be complied with expeditiously.

In the event an arbitrator is selected and a hearing date scheduled and agreed upon by both parties and either party subsequently cancels such hearing, the party so cancelling shall pay any cost assessed by the arbitrator. Except as provided above, the compensation and expenses of the arbitrator and arbitration shall be divided equally, provided, however, that each party shall bear the expenses in respect to its own witnesses and that the cost of any report or transcript shall be divided equally only if furnished by mutual consent. Each party shall pay one-half of the aggrieved employee's time lost from work for appearance at the arbitration proceedings.

Supreme Court, U.S.
FILED
JAN 12 1983
ALEXANDER L. STEVAS
CLERK

No. 82-969

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AERONAUTICAL MACHINISTS LODGE 709,
IAM & AW, AFL-CIO,
Petitioner,

v.

LOCKHEED-GEORGIA COMPANY,
division of LOCKHEED CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

DUANE C. ALDRICH
Counsel of Record
R. SLATON TUGGLE, III
KILPATRICK & CODY
3100 Equitable Building
100 Peachtree Street
Atlanta, Georiga 30043
(404) 572-6500

ROBERT P. BARTON
LOCKHEED-GEORGIA COMPANY
86 South Cobb Drive
Marietta, Georgia 30063
(404) 424-3388

Attorneys for
Lockheed-Georgia Company

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether a labor arbitrator, as an aspect of the "common law of the shop," may recognize that a union representative has an implicit duty to refrain from physical violence in dealing with management representatives, and whether a breach of that duty permits an employer to deny plant access to the individual in question.

2. Whether a labor arbitration award denying plant access to a union representative who assaulted management representatives is based on the collective bargaining agreement and the "common law of the shop," and therefore should be enforced by the courts.

3. Whether a court, after setting aside a labor arbitration award, must interpret the collective bargaining agreement and issue its own remedy instead of leaving to arbitration any remaining dispute under the agreement.

4. Whether an award of attorney's fees may be made against a party that refuses to abide by a labor arbitration award "without justification."

LIST OF PARTIES

Lockheed-Georgia Company (hereinafter "Lockheed" or the "Company") agrees with the list of parties submitted by Aeronautical Machinists Lodge 709, IAM & AW, AFL-CIO (hereinafter the "Union").

Pursuant to Rule 28.1 of the United States Supreme Court Rules, Lockheed also submits the following list of all parent, subsidiary and affiliate corporations:

Lockheed Air Terminal, Inc.
Lockheed Air Terminal, S.A.
Lockheed Aircraft (Asia) Limited
Lockheed Aircraft (Australia) Pty. Limited
Lockheed Aircraft Corporation of Canada Limited
Lockheed Aircraft Deutschland Gmbh
Lockheed Aircraft International, A.G.
Lockheed Aircraft International, Inc.
Lockheed Aircraft Service Singapore Private Limited
Lockheed Corporation International, S.A.
Lockheed Electronics Company, Inc.
Lockheed Engineering and Management Services Company, Inc.
Lockheed Finance Corporation
LFC Credit Corporation
Lockheed Georgia International Services, Inc.
Lockheed Missiles & Space Company, Inc.
Lockheed Properties, Inc.
Lockheed Shipbuilding and Construction Company
Lockheed Support Systems, Inc.
Lockheed Systems and Services Company, Inc.
Lockheed Systems S.A.
Lockheed Technical Services Company, Inc.
Lockheed Technology S.A.
Lockheed Western Export Company
Murdock Machine and Engineering Company of Texas
Tristar Parts, Ltd.

Arizona Fueling Facilities Corporation
CTL Corporation
Honolulu Fueling Facilities Corporation
Lockheed-Salt Electronics S.A.
Ocean Minerals, Inc.
Portland Fueling Facilities Corporation
Transnational Housing Company
Lockheed Leadership Fund
Lockheed Aircraft Service—International
Lockheed S.A. de C.V.
Lockheed Systems Company, Inc.
Airarms Incorporated
Colby Crane & Manufacturing, Inc.
Lockheed Aircraft International, S.A.
Lockheed Aircraft Service Company, Inc.
Lockheed Electronics International Operations, Inc.
Lockheed Overseas Capital N.V.
Panel Lock Homes (PHIL) Inc.
Puget Sound Bridge & Dry Dock Company, Inc.
Solar Research Management Corporation
Vega Aircraft Company
Aeronautica Macchi, S.P.A.
Aviaco Traders Limited
Aviquipo, Inc.
Lockheed Aircraft Nederland B.V.
Lockheed Asian Export Company
Lockheed Petroleum Services, Inc.
Lockheed Petroleum Services, Ltd.
Lockheed Equipamentos E. Servicos Ltda.
Lockheed Petroleum Services (U.K.) Limited

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	vii
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
I. The Arbitration Award	2
II. The District Court's Decision to Remand the Dispute to Arbitrator Williams	6
III. Arbitrator Williams' Decision on Remand	7
IV. The District Court's Decision to Vacate the Arbitration Award	9
V. The Eleventh Circuit's Decision Reversing and Remanding the Case for Further Proceedings	10
SUMMARY OF ARGUMENT	11
ARGUMENT	14
I. The Eleventh Circuit's Decision to Enforce the Arbitration Award Is Consistent with Decisions of this Court and Decisions of other Circuit Courts	14
A. The Arbitrator Did Not Exceed His Authority by Recognizing an Implicit Duty of Union Representatives to Refrain from Physical Violence	15

TABLE OF CONTENTS—Continued

Page

B. The Eleventh Circuit Correctly Ruled that the District Court Could Not Substitute its Interpretation of the Agreement for the Interpretation of the Arbitrator 19

II. The Lower Courts' Denial of Injunctive Relief to the Union Was Consistent with the Decisions of this Court 22

III. This Case and the *W.R. Grace* Case Have No Issue in Common 26

IV. The Standard for an Award of Attorney's Fees Announced by the Circuit Court Does Not Conflict with Decisions of this Court 28

CONCLUSION 30

TABLE OF AUTHORITIES

Cases	Page
Alexander v. Gardner-Denver Co., 461 U.S. 36 (1974)	26
Arrow Trailers, Inc., 62 Lab. Arb. & Disp. Settl. 387 (Caraway, 1974)	18
Associated Hospitals of East Bay, Inc., 47 Lab. Arb. & Disp. Settl. 858 (Koven, 1966)	18
Associated Hospitals of San Francisco, Inc., 62 Lab. Arb. & Settl. 323 (Koven, 1976)	18
Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962)	26
Barrentine v. Arkansas Freight Systems, 450 U.S. 728 (1981)	26
Boise Cascade Corp. v. United Steelworkers of America, Local Union No. 7001, 588 F.2d 127 (5th Cir.), *cert. denied*, 444 U.S. 830 (1979)	19
Brotherhood of Railroad Trainmen v. Central of Georgia Ry., 415 F.2d 403 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008 (1970)	24
Fitzsimons Manufacturing Company, 251 NLRB 375 (1980)	18
International Association of Machinists and Aerospace Workers District No. 145 v. Modern Air Transport Company, Inc., 495 F.2d 1241 (5th Cir.), *cert. denied*, 419 U.S. 1050 (1974)	23, 24, 25
International Brotherhood of Electrical Workers, Local 2188 v. Western Electric Co., 661 F.2d 514 (5th Cir. 1981)	25
Kimberly-Clark Corp., 63 Lab. Arb. & Disp. Settl. 37 (Simon, 1974)	18
Locals 2222, 2320-2327, International Brotherhood of Electrical Workers v. New England Telephone and Telegraph Co., 628 F.2d 644 (1st Cir. 1980)	25
N.L.R.B. v. Sun Co. of San Bernardino, California, 215 F.2d 379 (9th Cir. 1954)	18
Smith v. Union Carbide Corp., 350 F.2d 258 (6th Cir. 1965)	24
Summit Valley Industries v. Carpenters Local Union 112, 102 S. Ct. 2112 (1982)	13, 29

TABLE OF AUTHORITIES—Continued

Page

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 25, 29

Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 29

United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960) 11, 12, 23, 25

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 11, 12, 14, 20, 22, 23

United Steelworkers of America v. United States Gypsum Company, 492 F.2d 713 (5th Cir.), *cert. denied*, 419 U.S. 998 (1974) 29

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 11, 14, 16, 23

W.R. Grace & Co. v. Rubber Workers Union Local 759, 652 F.2d 1248 (5th Cir., Unit A, 1981, *cert. granted*, No. 81-1314, June 28, 1982) 13, 26, 27, 28

Yates v. Yellow Freight Systems, 501 F. Supp. 101 (S.D. Ohio 1980) 24

Other Sources

R. Gorman, *Basic Text on Labor Law* (1976) 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-969

AERONAUTICAL MACHINISTS LODGE 709,
IAM & AW, AFL-CIO,
Petitioner,

v.

LOCKHEED-GEORGIA COMPANY,
division of LOCKHEED CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

Respondent Lockheed-Georgia Company (hereinafter "Lockheed" or the "Company") respectfully submits this Brief in Opposition to the Petition for a Writ of Certiorari filed by Aeronautical Machinists Lodge 709, IAM & AW, AFL-CIO (hereinafter the "Union"), and requests that the Petition be denied for the reasons stated hereafter.

STATUTORY PROVISIONS INVOLVED

Lockheed agrees with the Union that this case involves Section 301 of the Labor Management Relations Act, as amended, 29 U.S.C. § 185, but denies that this case involves Rule 52(a) of the Federal Rules of Civil Procedure. Rule 52(a) relates to the setting aside of findings

of fact by a district court. However, in this case the Eleventh Circuit did not set aside any findings of fact that the District Court had authority to make. Moreover, the Union has not indicated in its Petition how Rule 52(a) bears upon this case.

STATEMENT OF THE CASE

Lockheed believes that the nature of this dispute is not clearly explicated by the Union's Statement of the Case. Therefore, Lockheed respectfully submits its own statement of the case.

I. The Arbitration Award.

This case involves the enforceability of a labor arbitration award. The award in question holds that Lockheed was entitled to bar from its premises a Union business representative, Mr. R. P. Mason, who had engaged in a persistent course of extraordinary misconduct, including physical assaults upon management personnel. (App. A).[1] That award was issued pursuant to a collective bargaining agreement (the "Agreement") between Lockheed and the Union, which provided that disputes concerning the interpretation or application of the Agreement should be resolved by arbitration. The arbitration provision of the Agreement, Part B, Article III, Section 5, states that the arbitrator's decision "will be final and binding upon the Company, the Union, and the employee, and shall be complied with expeditiously." (App. Q, p. 5q).

The circumstances leading to the Company's decision to bar Mr. Mason from its premises are summarized in the Arbitrator's Award. (App. B, pp. 2b, 4b). On a number of occasions, the Company notified the Union that Mr. Mason had physically or verbally abused management personnel during the course of his Union activities. (App. B, pp. 3b, 8b). However, the Company was un-

[1] "App." followed by a letter will refer to the designated section of the Appendix filed by the Union with its Petition.

successful in obtaining the Union's cooperation in restraining Mr. Mason from engaging in further violent outbursts against Company personnel. (App. B, pp. 3b, 8b). Mr. Mason's abusive conduct continued, and after Mr. Mason kicked Division Manager Webb Wright on March 29, 1976, the Company warned the Union that further misconduct by Mr. Mason would force the Company to bar him from its premises. (App. B, p. 3b.) Despite this warning, on April 29, 1977, Mr. Mason attacked Production Supervisor Jim Chesser, striking him in the stomach during a discussion in the office of another Lockheed supervisor. (App. B, pp. 2b, 7b).

As a result of Mr. Mason's assault against Mr. Chesser and his long history of similar misconduct toward other Company personnel, the Company decided to permanently bar Mr. Mason from its premises in order to protect its employees from further abuse. In response, the Union presented the Company with a written grievance alleging that Lockheed's action barring Mr. Mason from the plant was in violation of Article II, Section 2 of the Agreement. (App. Q, p. 1q). That provision of the Agreement states as follows:

> The President, Vice-President and Business Representatives of the Union shall have access to the Labor Relations Department Office for the purpose of contacting Labor Relations personnel and *shall have access to the Departments of the Company's plant to which they are assigned for the sole purpose of contacting the Union Steward or Committeeman concerning employee complaints or grievances or matters arising out of the application of this Agreement. Such visits shall be made subject to such regulations as may be made from time to time by the Company.* The Company shall not impose regulations which will render ineffective the purposes of this Section.

(App. Q, pp. 1q-2q) (emphasis added). The Union's grievance was referred to arbitration, and a four-day

hearing on the grievance was held before Arbitrator Roger C. Williams. (App. B, p. 1b).

Under the arbitration provision of the Agreement, in the absence of a stipulation between the parties as to the issue for arbitration, the arbitrator "shall determine the issue or issues to be heard, provided that said issue or issues are arbitrable in accordance with this Section." (App. Q, p. 4q). Based on the evidence submitted and the contentions of the parties, Arbitrator Williams decided that the issue was "whether or not the Company violated the Agreement by permanently barring business representative R. P. Mason from all Company-controlled property on May 3, 1977." (App. B, p. 6b).

In addressing this issue in his Award, Arbitrator Williams first resolved the factual disputes and found that Mr. Mason did indeed assault Mr. Chesser in the incident that led to Mr. Mason's debarment, and that Mr. Mason's assault against Mr. Chesser "culminated a *series* of incidents in which [Mr. Mason] committed the serious misconduct of physically abusing management personnel." (App. B, p. 7b) (emphasis added). Arbitrator Williams also found that, after other assaults by Mr. Mason, Lockheed had *repeatedly* warned the Union that continued misconduct would lead to the denial of Mr. Mason's access to Company property. (App. B, p. 8b).

Arbitrator Williams then interpreted the Agreement between Lockheed and the Union and concluded that Lockheed's decision to bar Mr. Mason from Lockheed-controlled premises did not violate that Agreement. Arbitrator Williams noted that a "rule of reasonableness" must be used in interpreting collective bargaining agreements, and concluded that the Union access provision, Article II, Section 2, did not require Lockheed to grant plant access to an individual who engaged in violent misconduct. (App. B, p. 8b). Arbitrator Williams' analysis in this regard was as follows:

> A rule of reasonableness must be used to interpret and apply the provisions of collective bargaining agreements. Article II, Section 2 of the Agreement specifically gives Business Representatives of the Union the right to access to the Labor Relations Department Office and the departments of the plant for specified purposes. Implicit in those provisions is the requirement that Business Representatives conduct themselves in a manner consistent with commonly accepted behavior in their adversary relationship with management personnel. The right to access to Company facilities may properly be denied an individual who commits physical violence toward others, activity which is clearly beyond the limit of acceptable behavior. . . . . *Grievant's physical abuse of management personnel was sufficiently serious misconduct, committed while he was exercising his right to access to the plant, to justify the Company's action in barring him from Company-controlled facilities.* After he and Local Lodge 709 had been warned of the consequences, he engaged in activity not included in the specified purposes for which he had been granted the right to have access to the plant, and *the physical violence which he perpetrated on management personnel went far beyond any activity which could reasonably be expected of or tolerated from a Business Representative engaged in the representation of bargaining unit employees or the aggressive advocacy of employee rights.* Grievant's conduct while in the Company's plant amounted to an abuse of his right to have access to the plant. *The Company's action in permanently barring Grievant from the plant was justified by his misconduct and did not violate the Agreement.*

(App. B, pp. 8b-9b) (emphasis added). Based upon this analysis, Arbitrator Williams denied the Union's grievance and concluded that Lockheed had not violated the Agreement by barring Mr. Mason from its plant. (App. B, p. 9b).

II. The District Court's Decision to Remand the Dispute to Arbitrator Williams.

After Arbitrator Williams issued his Award, the Union initiated this litigation and the parties filed cross-motions for summary judgment. On June 30, 1980, the District Court issued its first Order in this case, granting neither motion for summary judgment, but ordering the parties to resubmit the case to Arbitrator Williams for additional findings. (App. E).

Despite Arbitrator Williams' careful analysis of the interplay between various explicit and implicit obligations under the Agreement, the District Court largely disregarded that analysis and focused its attention on a single provision of the Agreement: that "[t]he Company shall not impose regulations which will render ineffective the purposes of" Article II, Section 2 of the Agreement. Under the District Court's interpretation of the Agreement, the sole question that could be decided by the Arbitrator was whether the Company's action had rendered Article II, Section 2 "ineffective," and the District Court further concluded that the Company's justification for its action was completely irrelevant to the resolution of this question. (App. E, pp. 4e-5e). The District Court therefore held that Arbitrator Williams had somehow gone beyond the issue submitted to him in finding that the Company's action was "justified." (App. E, p. 4e). Ignoring Arbitrator Williams' recognition of a duty of Union representatives to refrain from violence, the District Court stated its own interpretation of the Agreement to be that if Lockheed's action rendered the purposes of Article II, Section 2 ineffective, its action was a violation of that provision *"no matter how justified."* (App. E, p. 4e) (emphasis added).

The District Court then redefined the issue which, under its interpretation of the Agreement, *should* have been decided by the Arbitrator. Although as noted above the

Agreement states that in the absence of a stipulation by the parties the *Arbitrator* shall determine the issue, the District Court decided that the proper issue for arbitration was "whether the Company's action rendered ineffective the purposes of the business representative provision and thereby violated the collective bargaining agreement." (App. E, pp. 4e-5e). In order to obtain a specific finding on this issue, the District Court remanded the case to Arbitrator Williams. (App. E, p. 5e).

Seeking to avoid protracted litigation over the validity of the original Award, Lockheed filed a motion for reconsideration, or in the alternative, for leave to file an immediate appeal. That motion was denied, and the case was resubmitted to Arbitrator Williams. (*See* App. G, p. 3g).

III. Arbitrator Williams' Decision on Remand.

On March 4, 1981, Arbitrator Williams issued a Supplemental Award addressing the issue formulated by the District Court. (App. F). Arbitrator Williams resolved that issue in favor of Lockheed and again ruled that Lockheed had not violated the Agreement. Arbitrator Williams noted that "seemingly unrestricted rights" granted in a collective bargaining agreement may "include implicit restrictions and corresponding obligations which are effectuated only when unusual or unanticipated circumstances arise." (App. F, pp. 2f-3f). Implicit in the Union's right to access, Arbitrator Williams reasoned, is the requirement that Union representatives conduct themselves "in a manner which is consistent with the purposes for which access has been granted." (App. F, p. 3f). Arbitrator Williams then observed that "a business representative who exercises the right to access to the plant is obligated to refrain from engaging in activity which exceeds the limits of acceptable conduct." (App. F, p. 3f).

Applying these principles to the record before him, Arbitrator Williams concluded that Mr. Mason's conduct

was "repugnant to the collective bargaining process" and that he had waived any right of plant access:

> *Mason's conduct while he exercised his right to access to the plant as a Business Representative was repugnant to the collective bargaining process, was an abuse of the right to access to the plant, and constituted a complete failure to fulfill his obligation for proper conduct while acting in an official capacity.* By engaging in such conduct, he breached the implicit obligation for proper conduct, upon which the right to access to the plant is contingent under Article II, Section 2 of the Agreement. *By breaching the obligation for proper conduct while acting in an official capacity, Mason waived and forfeited his corresponding right as a Business Representative to have access to the plant, and waived and forfeited the Union's corresponding right to have Mason granted access to the plant in his official capacity.* On the basis of Mason's forfeiture and waiver of the right to access to the plant, the Company had the authority to rescind the right to access as it applied to Mason, and the Company did not violate Article II, Section 2 of the Agreement by permanently barring Mason from Company controlled premises.

(App. F, p. 4f) (emphasis added).

As a further answer to the issue posed by the District Court, Arbitrator Williams gave two additional independent bases for his decision. First, he found that Lockheed's denial of plant access to Mr. Mason was not a "regulation" which rendered ineffective the purpose of Article II, Section 2, because "regulations" within the meaning of that provision concern only the *manner* in which plant visits are made, rather than the *right of access.* (App. F, pp. 4f-5f). In addition, Arbitrator Williams concluded that the general purpose of Article II, Section 2 was *not* unduly impaired by the denial of plant access to Mr. Mason, because other business representatives of the Union continued to have access to the plant. (App. F, pp. 4f-5f).

In summary, Arbitrator Williams concluded that Lockheed's action barring Mr. Mason from its premises did not render the purposes of Article II, Section 2 ineffective. (App. F, p. 5f). Thus, Arbitrator Williams explicitly resolved the issue posed by the District Court, and again concluded that the Company's action did not violate the Agreement.

IV. The District Court's Decision to Vacate the Arbitration Award.

After the issuance of the Supplemental Award, the matter was returned to the District Court for action on the parties' outstanding motions for summary judgment. Although Arbitrator Williams had carefully addressed and decided the issue framed by the District Court, the District Court rejected the Arbitrator's resolution of that issue. The District Court stated its view that the Arbitrator's contractual analysis was improperly "premised" on the Arbitrator's previous finding that Lockheed's action was "justified." (App. G, p. 4g). The District Court reiterated that under its own interpretation of Article II, Section 2 of the Agreement, the question whether Lockheed had violated the Agreement must be resolved *"without regard to the arguments the Company might put forth to justify its action."* (App. G, p. 5g) (emphasis added). In response to the Company's argument that the duty to refrain from violence was part of the "common law of the shop," the District Court concluded that the Arbitrator could *not* consider the "common law of the shop" in this case because there was no ambiguity in the Agreement. Thus, having concluded that the Arbitrator had exceeded his authority by employing incorrect contractual analysis, the District Court vacated Arbitrator Williams' Award.

The Union then filed a motion seeking an order requiring Lockheed to grant plant access to Mr. Mason, arguing that the District Court's order vacating the Award was

a decision on the merits of the grievance. The District Court denied this motion based on its conclusion that it lacked authority to grant the requested relief. (App. H).

V. The Eleventh Circuit's Decision Reversing and Remanding the Case for Further Proceedings.

The Company appealed from the District Court's Order vacating the Arbitrator's Award, and on July 21, 1982 the Eleventh Circuit reversed the District Court's decision. (App. A). One might infer that the Eleventh Circuit found this case to contain no novel, difficult or previously undecided issues, because it placed the case on its non-argument calendar and decided the case in an unpublished, *per curiam* opinion. (App. A, p. 1; *See* Rule 23, Interim Rules of the United States Court of Appeals for the Eleventh Circuit; Internal Operating Procedures of the United States Court of Appeals for the Eleventh Circuit, p. 15).

In reversing the District Court, the Eleventh Circuit stated as follows:

> A reading of the arbitrator's original award reveals that it was based on an interpretation of the collective bargaining agreement together with the law of the shop. His analysis and reasoning with regard to the implicit obligation of a business representative to conduct himself in a manner consistent with commonly accepted behavior cannot be said to be without foundation in reason or fact. . . . The arbitrator's original award drew its essence from the collective bargaining agreement and the arbitrator in reading the agreement did not exceed his authority by applying the law of the shop.

(App. A, p. 8a).

Because the Eleventh Circuit found that the original Arbitration Award was valid and should have been enforced, it found that the District Court also erred in remanding the case to the Arbitrator for clarification of

that unambiguous award. (App. A, p. 10a). The Eleventh Circuit further found that in any event the District Court erred in vacating the Arbitrator's Supplemental Award. The Eleventh Circuit found that the Arbitrator's reasoning in his Supplemental Award was "rationally based on the collective bargaining agreement and the law of the shop." (App. A, pp. 10a-11a). Because the Eleventh Circuit found that both the Arbitrator's original Award and Supplemental Award were valid and enforceable, that Court also rejected the Union's request for an injunction requiring Lockheed to grant Mr. Mason access to its property. (App. A, p. 11a).

Finally, the Eleventh Circuit observed that a court has authority to award attorney's fees in a Section 301 action where it determines that a party has refused to abide by an arbitration award "without justification." (App. A, p. 11a). The Eleventh Circuit therefore remanded the case to the District Court for a determination as to whether the Union should be required to compensate the Company for its attorney's fees in this case.

SUMMARY OF ARGUMENT

Nothing in this case requires review by the Supreme Court, because the decision of the Eleventh Circuit in this case was entirely consistent with this Court's decisions regarding judicial review of labor arbitration awards. Indeed, the legal principles involved in this case were set forth by this Court in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960), and *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (the "*Steelworkers Trilogy*"), and nothing in this case requires either a reconsideration or even a novel application of those principles.

Under this Court's decisions, an arbitration award can only be set aside if it "fails to draw its essence" from the

applicable collective bargaining agreement and the "common law of the shop." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). In determining whether the award has satisfied this requirement, a court is not to engage in its own contractual interpretation and cannot set the arbitrator's award aside merely because a court would have rendered a different interpretation than the arbitrator. *Id.*

The Eleventh Circuit vindicated these principles by reversing the District Court and enforcing the Arbitration Award. The Eleventh Circuit found that the Award *did* draw its essence from the Agreement and the common law of the shop. Further, the Eleventh Circuit found that the District Court, in setting aside the Award, had merely engaged in its own interpretation of the Agreement and had substituted its judgment for the judgment of the Arbitrator. Thus, in reversing the District Court, the Eleventh Circuit explicitly applied this Court's rulings regarding the proper scope of judicial review of labor arbitration awards.

The decisions below are also completely consistent with the decisions of this Court insofar as the courts below have refused to rule on the merits of the underlying grievance, and have denied the Union's request for an injunctive order requiring Lockheed to grant plant access to Mr. Mason. As an initial matter, the Award of the Arbitrator denying plant access to Mr. Mason was valid, and therefore the Union was bound by the Award and was not entitled to the relief it requested. Moreover, assuming *arguendo* that the Award was invalid, this Court has held that where the parties to a collective bargaining agreement have provided for arbitration of a dispute, the courts have no authority to decide the merits of such a dispute. Instead, the parties must submit the dispute to arbitration. *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 567-68

(1960). Therefore, even if the Award in this case were properly set aside, the remedy would not be for the District Court to impose its own interpretation of the Agreement, but would be for the aggrieved party to resubmit the matter to arbitration in accordance with the Agreement.

The Union has also sought a writ of certiorari for this case on the ground that this case presents issues already before the Court in *W.R. Grace & Co. v. Rubber Workers Union Local 759*, 652 F.2d 1248 (5th Cir., Unit A, 1981, certiorari granted, No. 81-1314, June 28, 1982). However, the issues presented in *W.R. Grace* are not involved in this case, and this Court's decision in *W.R. Grace* will have no impact on the correctness of the Eleventh Circuit's decision in this case. *W.R. Grace* involves the questions whether an arbitrator is bound by the previous findings of a court, and whether an arbitrator's award may be set aside where his award does not even refer to the contract and does not purport to draw its essence from the contract. In the instant case, there were no prior judicial findings that were contrary to the Arbitrator's Award, and the Arbitrator did expressly interpret the Agreement as a basis for his Award. Therefore, this Court's ruling in *W.R. Grace* will be inapposite to the issues presented by the instant case.

Finally, the Union has argued that the Eleventh Circuit's decision is in conflict with this Court's decision in *Summit Valley Industries v. Carpenters Local Union 112*, 102 S. Ct. 2112 (1982), insofar as the Eleventh Circuit directed the District Court to reconsider Lockheed's request for attorney's fees. However, *Summit Valley* does not apply to Section 301 actions such as this action. In any event, there has been no final determination of the attorney's fees issue in this case by any lower court, so that that issue is simply not ripe for review by this Court.

ARGUMENT

I. THE ELEVENTH CIRCUIT'S DECISION TO ENFORCE THE ARBITRATION AWARD IS CONSISTENT WITH DECISIONS OF THIS COURT AND DECISIONS OF OTHER CIRCUIT COURTS.

As its first reason for requesting the issuance of a writ of certiorari, the Union asserts that the Eleventh Circuit's decision in this case conflicts with decisions of the Supreme Court and with precedent in other circuit courts of appeals. In this regard, the Union suggests that the Eleventh Circuit's decision upholds an arbitration award that is in violation of plain contractual provisions and that fails to draw its essence from the Agreement.

The Union has attempted to characterize the issue in this fashion in order to persuade the Court to review this case. However, it is apparent that the Union's Petition is merely part of the Union's ongoing effort to have the judiciary reinterpret the Agreement and rule in the Union's favor on the underlying grievance. The Eleventh Circuit correctly rejected this effort by the Union and, relying on the guidelines established over twenty years ago in the Supreme Court's *Steelworkers Trilogy*, ruled that the award in dispute was enforceable because it did draw its essence from the Agreement.

The Eleventh Circuit found its chief source of guidance in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) and *United Steelworkers of America v. Enterprise Wheel & Car Co.*, 363 U.S. 593 (1960). In those cases, the Supreme Court announced three fundamental principles which are the foundation of the Eleventh Circuit's decision in this case: (1) the merits of an arbitration award are not subject to judicial review; (2) a court must not set aside an arbitration award simply because the court would have interpreted the collective bargaining agreement differently than the arbitrator did; and (3) a court must not

set aside an arbitration award unless the award fails to draw its essence from the collective bargaining agreement and from the "common law of the shop."

It appears that all parties to this litigation *agree* with these basic principles. Thus, there are no substantial legal issues raised by the decision below. Instead, the issues raised by the Union concern merely the question whether the relevant principles were correctly *applied* by the Eleventh Circuit. Furthermore, the Union's argument that the Eleventh Circuit's decision is in *conflict* with the principles announced in *Warrior & Gulf Navigation* and *Enterprise Wheel & Car Corp.* is based on nothing more than the Union's continuing disagreement with the Arbitrator's interpretation of the Agreement. Stated simply, the Union's argument is that the Arbitrator reached the *wrong* interpretation of the Agreement and that the Award therefore failed to draw its "essence" from the Agreement. This is a bootstrap argument in which the Court must substitute its interpretation of the Agreement for that of the Arbitrator before the Court could even decide whether to enforce the Award. As will be seen below, this analysis proposed by the Union is contrary to principles established by this Court.

A. The Arbitrator Did Not Exceed His Authority by Recognizing an Implicit Duty of Union Representatives to Refrain from Physical Violence.

The Union's principal argument concerns the Arbitrator's finding that the Union's right of plant access included the corresponding implicit duty of Union representatives to refrain from violence. While Lockheed submits that this obligation is a self-evident part of any collective bargaining relationship, the Union reasons that the Award does not draw its essence from the Agreement because it depends on the Arbitrator's application of this "implicit" obligation. According to the Union, recognition of this obligation is contrary to the "plain" terms of the Agreement regarding plant access.

The Eleventh Circuit properly rejected this argument. First, the Union is simply wrong in asserting that there are "plain" contractual terms that were violated by the Award. As the Arbitrator explained in the Supplemental Award, the Arbitrator did nothing more than to recognize that the contractual right of plant access was for a specific, *limited* purpose, and was *not* intended to permit physical violence by Union representatives in the Lockheed plant. By engaging in violence and exceeding the limited purposes for which plant access was granted, Mr. Mason waived his right of access. The Award and Supplemental Award are thus consistent with a perfectly straightforward reading of the Agreement.

Nor is any difficulty presented by the fact that the duty to refrain from violence is an implicit part of the collective bargaining relationship. The principle that a labor arbitrator is *expected* to apply implicit terms of a contract was made clear by the Supreme Court's decision in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). In that case, the Supreme Court noted that collective bargaining agreements are typically vague as to many terms, because the parties are *compelled* by circumstances to reach some agreement and are likely to leave some problems to future resolution. The arbitrator fills a vital role in "solving the unforseeable by molding a system of private law for all the problems which may arise . . . in a way which will generally accord with the variant needs and desires of the parties." *Id.* at 580-81. Thus, this Court recognized that labor arbitrators must be allowed to rely on the many implicit obligations which, over time, have become a part of either the "common law of the shop" or the practices of the contracting parties:

> The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts. . . .

> *The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it.* The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. *The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequences to the morale of the shop, his judgment whether tensions will be heightened or diminished.* For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

363 U.S. at 581-82 (emphasis added).

In the instant case, there was no contractual provision dealing specifically with the problem of physical violence by Union representatives. Thus, faced with the extraordinary problem of a Union business representative who physically attacked management representatives, Arbitrator Williams relied upon the implicit but universally-recognized principle that physical violence has no place in labor-management relations.

In finding a waiver of the right of plant access, it is clear that Arbitrator Williams was not precluded from recognizing the inherent obligation of labor representatives to refrain from violence. Arbitrator Williams' application of this implicit duty was well-founded, for it is widely recognized that an employer has no obligation to

tolerate physical violence in its plant, even when that violence is perpetrated by union representatives. Arbitrators, federal courts, and the National Labor Relations Board have all so held.[2]

In the instant case, the Eleventh Circuit properly pointed out that the obligation to refrain from physical violence was a part of the "common law of the shop." Relying on this Court's decision in *Warrior & Gulf Navigation Co.*, the Eleventh Circuit ruled that the Arbitrator was well within his authority in considering this "common law of the shop" in issuing his Award. (App. A, p. 8a).

The Union argues that it was improper to apply such implicit obligations in this case because the Agreement granted Mr. Mason access to Company property in what the Union contends are plain and absolute terms.[3] How-

---

[2] *See, e.g., Fitzsimons Manufacturing Co.*, 251 NLRB 375 (1980) (A single incident of misconduct by a union representative had so "weakened the fabric of the bargaining relationship and engendered such ill will as to legally entitle Respondent to refuse to meet with" the responsible individual.); *N.L.R.B. v. Sun Co. of San Bernardino, California*, 215 F.2d 379, 382 (9th Cir. 1954) ("There must be some area in labor relations where an employer has the right to clear up a situation which not only threatens the orderly functioning of its business but could erupt into physical violence."); *Associated Hospitals of San Francisco*, 62 Lab. Arb. & Disp. Settl. 323, 327 (Koven, 1976); *Associated Hospitals of the East Bay, Inc.*, 47 Lab. Arb. & Disp. Settl. 858, 861 (Koven, 1966); *Kimberly-Clark Corp.*, 63 Lab. Arb. & Disp. Settl. 37 (Simon, 1974); *Arrow Trailers, Inc.*, 62 Lab. Arb. & Disp. Settl. 387, 388 (Caraway, 1974).

[3] The Union also argues that the Arbitrator was required to apply only express terms of the Agreement, because the arbitration provision states that "The arbitrator shall not have authority to amend or modify this Agreement or establish new terms and conditions of this Agreement." (App. Q, p. 5q). However, this contractual provision is a typical clause which confirms the fact that the arbitrator's decision must draw its "essence" from the collective bargaining agreement, but which should not be construed as a limitation on the arbitrator's broad authority to *interpret* the obligations

ever, in light of the universal recognition that violence cannot be tolerated in an industrial plant, it is far from "clear" that the parties' specific intent was to grant an absolute right of access to an individual who presented a demonstrated risk of physical harm to the employees within the plant. Rather, it is perfectly reasonable to conclude that in negotiating a provision for Union access to the plant, the parties did *not* intend that that provision could be abused by an individual whose attacks on Lockheed personnel have been found to be "repugnant to the collective bargaining process." (App. F, p. 4f). This was the interpretation chosen by the Arbitrator. Further, this interpretation does not *conflict* with the plant access provision of the Agreement, but is a perfectly rational *interpretation* of that provision, in light of the universally recognized obligation to refrain from physical violence. The Eleventh Circuit thus properly ruled that this interpretation was valid and was not subject to being set aside by the courts.

B. The Eleventh Circuit Correctly Ruled that the District Court Could Not Substitute its Interpretation of the Agreement for the Interpretation of the Arbitrator.

Throughout this litigation, the Union has argued that the Arbitrator deviated from the "plain" meaning of the Agreement in concluding that Lockheed could bar a Union representative from its plant because of that individual's physical violence. In essence, the Union's argument is thus that the Arbitrator rendered an incorrect interpretation of the Agreement.

While the Union originally was successful in convincing the District Court that the Arbitrator had rendered an improper interpretation of the Agreement, the Eleventh

---

of the parties in light of all relevant considerations. *See, e.g., Boise Cascade Corp. v. United Steelworkers of America, Local No. 7001*, 588 F.2d 127, 129-30 (5th Cir.), *cert. denied*, 444 U.S. 830 (1979); R. Gorman, *Basic Text on Labor Law* 589 (1976).

Circuit correctly observed that the Arbitrator's interpretation was not subject to judicial review. The Eleventh Circuit's decision in this regard was in accordance with the decisions of this Court. This Court has imposed strict limitations upon judicial review of labor arbitration awards, because of the arbitrator's special competence in labor matters, and because of the federal policy favoring resolution of labor disputes by arbitration. The Court also has emphasized that it is not the function of the courts to re-examine a labor arbitrator's factual determinations, or to reconsider the arbitrator's interpretation of the collective bargaining agreement between the parties. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596-99 (1960). In reviewing a labor arbitrator's award, a court must not set the award aside unless the award fails to "draw its essence" from the collective bargaining agreement and the common law of the shop. *Id.* at 597. This Court has also stressed that the reviewing court must *not* attempt to engage in its own interpretation of the collective bargaining agreement, and *must not attempt to examine the correctness of the arbitrator's interpretation in light of legal principles. Id.* at 598-99. The Court has observed that when parties agree to submit labor disputes to arbitration, it is the *arbitrator's* interpretation of the agreement for which they bargain, and *"the courts have no business overruling him because their interpretation of the contract is different from his." Id.* at 599 (emphasis added).

The Eleventh Circuit was forced to reverse the judgment of the District Court because the District Court violated these well-settled principles and engaged in a complete reinterpretation of the Agreement. For example, among other errors, (1) the District Court redefined the issue for arbitration, contrary to the contractual mandate that the *arbitrator* would define the issue (*see* App. A, p. 9a); (2) the District Court created its own analytical framework for interpretation of the Agreement, which was contrary to the contractual analy-

sis used by the Arbitrator (*see* App. A, p. 9a); (3) the District Court ultimately set the Award aside because the District Court's interpretation of the Agreement was different from the Arbitrator's interpretation (*see* App. A, pp. 10a-11a); and (4) the District Court, in order to reach its conclusions, engaged in a complete re-examination of the record from the arbitration proceedings and made its own findings as to such matters as the past practice of the parties. (*See* App. G, pp. 6g-7g). Indeed, the District Court went so far as to rule that in the absence of an ambiguity in the Agreement, the Arbitrator was precluded from considering or applying the "common law of the shop" in rendering his award. (App. G, p. 6g). These conclusions by the District Court, as well as others discussed in the opinion of the Court of Appeals, were contrary to the express limitations established by this Court regarding judicial review of labor arbitration awards. The Court of Appeals was thus correct in reversing the District Court and directing that the arbitration awards be enforced.

Even if the District Court were correct in remanding the original Award for further findings and in redefining the issue to be decided by the Arbitrator, the Supplemental Award specifically decided the issue set forth by the District Court. In the Supplemental Award, Arbitrator William's explicitly ruled that the general purpose of Article II, Section 2 of the Agreement was not "rendered ineffective" by the Company's action, because "all other Business Representatives continued to have access to the plant." (App. F, p. 4f). Arbitrator Williams further concluded that "the bar to Mason's entry was not a regulation of plant visits which rendered the purpose of Article II, Section 2 ineffective, and the Company did not violate Article II, Section 2 by imposing the bar." (App. F, pp. 4f-5f). The Arbitrator thus answered the specific question framed by the District Court and concluded for the second time that the Company's action *did not violate the Agreement.*

In rejecting the Arbitrator's decision, the District Court reasoned that the Arbitrator's contractual analysis was erroneous. Indeed, the District Court went so far as to rule on which arguments of the parties could be considered in interpreting the Agreement. (*See* App. G, pp. 4g-5g). The District Court's reasoning thus directly contravenes this Court's rulings precluding judicial review of arbitration awards.

As noted above, the Supreme Court has ruled that matters of contract interpretation are exclusively within the domain of the arbitrator, and that courts must not examine the correctness of an arbitrator's decision in light of legal principles. *Enterprise Wheel & Car Corp., supra,* 363 U.S. at 598, 599. The Eleventh Circuit's decision in this case carries out that mandate, by ruling that the Arbitrator's conclusion was final and binding on the parties. Therefore, the Union's request for a writ of certiorari with respect to the enforceability of the Award should be denied.

II. THE LOWER COURTS' DENIAL OF INJUNCTIVE RELIEF TO THE UNION WAS CONSISTENT WITH THE DECISIONS OF THIS COURT.

As a second reason for requesting the issuance of a writ of certiorari, the Union asserts that it was entitled to a resolution of the merits of the dispute underlying the grievance. The Union seeks a judicial determination that Lockheed violated the Agreement in barring Mr. Mason from its premises as well as an order that Lockheed must grant Mr. Mason access to its property. This request is once again fundamentally at odds with this Court's rulings that the judiciary must not become involved in the merits of arbitrable disputes.

Of course, assuming *arguendo* that a court would have the authority to grant the requested relief, the Union would not be entitled to such relief unless it could show first that the Award deciding the dispute should be set aside. The Eleventh Circuit ruled correctly in this regard

that the Union was not entitled to any relief, for the reason that the Arbitration Award was valid and should not have been vacated by the District Court. The Eleventh Circuit therefore did not need to consider whether the District Court would have had authority to grant the relief requested by the Union. Similarly, the fact that the Award was valid and enforceable means that the Supreme Court has no reason to address the hypothetical question of whether the District Court could have granted the injunctive relief requested by the Union.

Nevertheless, assuming *arguendo* that the Award should have been set aside, still the District Court was correct in concluding that it had no authority to decide the underlying dispute, or (in effect) to grant injunctive relief by ordering Lockheed to provide plant access to Mr. Mason. In denying the relief requested by the Union, the District Court observed that "if the court were to order defendant to allow Mr. Mason into its facilities, it would be ruling on the contract dispute contrary to the long established federal policy of submitting labor disputes to binding arbitration." (App. H, p. 2h, *citing United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960)). The District Court also noted the Fifth Circuit's previous ruling that if a court finds that the arbitrator exceeded his authority, it *cannot* then go on to interpret the contract for itself. (App. H, p. 2h, *citing International Association of Machinists and Aerospace Workers, District No. 145 v. Modern Air Transport*, 495 F.2d 1241, 1244-45 (5th Cir. 1974), *cert. denied*, 419 U.S. 1050 (1975)).

In this respect, the District Court was correct. The parties provided in the Agreement that disputes over the interpretation of the Agreement were to be resolved exclusively by arbitration. Under such circumstances, the

courts have no jurisdiction to decide the merits of any grievance arising under the Agreement. *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 567-68 (1960).

The lower courts' denial of the relief requested by the Union is also consistent with other circuit court authority. In *International Association of Machinists & Aerospace Workers, District No. 145 v. Modern Air Transport, Inc.*, 495 F.2d 1241 (5th Cir. 1974), *cert. denied*, 419 U.S. 1050 (1975), the Fifth Circuit Court of Appeals found that the District Court had erred when it attempted to resolve the merits of a grievance after finding the arbitrator's award invalid. The Fifth Circuit stated:

> When the district court went on to interpret the contract, the court itself *improperly* "[resumed] its traditional goal of assaying the judicial acceptability of the award." The proper course for district court would have been to deny enforcement upon finding that the arbitrator manifested an "infidelity to his obligation."

495 F.2d at 1244-45 (emphasis added). *See also Smith v. Union Carbide Corp.*, 350 F.2d 258 (6th Cir. 1965); *Yates v. Yellow Freight Systems*, 501 F. Supp. 101 (S.D. Ohio 1980).

Although the law is clear that a court cannot decide the merits of a grievance in an action to vacate an arbitration award, the Union has endeavored to muddle the picture by citing a host of inapposite cases and inapplicable principles of law. Not one of the cases cited by the Union holds or even suggests that a court may decide the merits of an arbitrable grievance. Although the Union relies on *Brotherhood of Railroad Trainmen v. Central of Georgia Ry.*, 415 F.2d 403 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008 (1970), for the proposition that an award need not be enforced if it fails to draw its essence from the contract, nothing in that decision even remotely suggests

that the court could decide the underlying grievance after vacating the award. Similarly, the Union cites *Locals 2222, 2320-2327, International Brotherhood of Electrical Workers v. New England Telephone & Telegraph Co.*, 628 F.2d 644 (1st Cir. 1980), for the proposition that a party need not process a new *grievance* in order to resubmit a matter to an arbitrator for clarification of his award. Again, nothing in that case suggests that a *court* may decide the merits of a dispute which is subject to arbitration, even if an arbitrator's initial decision of the grievance has been vacated.

The Union additionally argues that the Court has authority to enforce the Agreement under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. This argument overlooks a fundamental principle of federal law under that provision: where the parties have agreed to resolve their contractual disputes through arbitration, that is how such disputes must be resolved. The Court "enforces" the contract by honoring the parties' agreement for resolution of disputes through arbitration. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960). For example, when one party refuses to arbitrate an arbitrable contractual dispute, a court does not decide the dispute for the parties but compels arbitration of the dispute. *See e.g., International Brotherhood of Electrical Workers, Local 2188 v. Western Electric Co.*, 661 F.2d 514 (5th Cir. 1981). And as noted earlier, a court that reviews an arbitration award and finds the award invalid is not authorized to decide the underlying dispute. *Modern Air Transport, supra.*

The Union asserts that "orders to arbitrate have been denied because it is the basic duty of the courts to enforce the provisions of collective bargaining agreements." (Union's Petition, p. 21). However, as is shown by the case cited by the Union, a denial of an order to compel arbitration is appropriate only if the parties have not

agreed to arbitrate the matter in question. *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962). Such is not the case here. The parties agreed to arbitrate the Union's grievance, and a court can only enforce the Agreement by permitting the parties to resolve the dispute through arbitration.

Trying still another tack, the Union attempts to draw an analogy between this case and cases involving the concurrent jurisdiction of the courts, the National Labor Relations Board, and arbitrators. Such cases arise when labor disputes involve claims both under statutory law and the provisions of a labor contract. (Union's Petition, pp. 22-23). In each of the cases cited by the Union, the court or the Board was not bound by the decision of an arbitrator as to matters of *statutory interpretation*, because such matters were not within the scope of the arbitrator's legal authority. *E.g., Barrentine v. Arkansas Freight System*, 450 U.S. 728 (1981) (action under Fair Labor Standards Act); *Alexander v. Gardner-Denver Co.*, 416 U.S. 36 (1974) (action under Title VII of the Civil Rights Act of 1964). In the instant case, the only question before the Court is whether Arbitrator Williams' decision interpreting and applying the Agreement should be vacated or confirmed. The underlying dispute is solely a matter of contract interpretation, and there is no question of any statutory violation by the Company. Thus, the issue raised by the Union's grievance is one reserved exclusively for arbitration, and the District Court correctly ruled that it could not grant affirmative relief as requested by the Union.

III. THIS CASE AND THE *W.R. GRACE* CASE HAVE NO ISSUE IN COMMON.

As a third reason for requesting a writ of certiorari, the Union has argued that there is some issue in this case that is already before this Court in *W.R. Grace & Co. v. Rubber Workers Union Local 759*, 652 F.2d 1248 (5th Cir., Unit A, 1981 certiorari granted, No. 81-1314,

June 28, 1982). However, an examination of the facts in that case shows that this Court's decision in *W.R. Grace* will have no bearing on this case.

In *W.R. Grace*, the court had compelled the employer to arbitrate certain grievances of laid-off employees after finding that the layoffs breached the collective bargaining agreement. Subsequently, an arbitrator denied the grievances on the ground that the employer had acted in good faith on the basis of its commitments under an EEOC conciliation agreement. The Arbitrator did not even purport to decide that case based on whether the employer's action breached the collective bargaining agreement. The Fifth Circuit found this award to be invalid because it was not based on *any* interpretation of the agreement, and because the award was in conflict with the court's determination prior to arbitration that the employer had breached the agreement.

The first issue presented in the petition for certiorari in *W.R. Grace* is thus whether a federal court, in granting an order to compel arbitration under a labor contract, may decide certain issues relating to the merits of the dispute and thereby withdraw from the arbitrator authority to decide those issues. *See* Petition for Writ of Certiorari in *W.R. Grace & Co. v. Rubber Workers Local 757*, Case No. 81-1314. This issue is not present in the instant case, because the Arbitration Award in the instant case was not inconsistent with any prior judicial order regarding the arbitrable dispute. Any arguable "conflict" between the Award and a judicial order did not occur until *after* the Award, when the District Court improperly rendered its own interpretation of the Agreement. Assuming *arguendo* that the Arbitrator subsequently became bound by the findings of the District Court in the erroneous order remanding the case to the Arbitrator, still the Arbitrator did answer the precise question submitted to him by the District Court and found that the Company had not rendered Article II, Section 2 ineffective and had not violated the Agreement.

Thus, there is no arguable conflict between an arbitrator's award and a prior court decision, as there was in *W.R. Grace.*

The second issue presented in *W.R. Grace* is whether a court may rule an arbitration award invalid because the award does not specifically refer to contract provisions supporting the award. *See* Petition for Writ of Certiorari in *W.R. Grace, supra.* This issue is not presented in this case, because the Award in this case is expressly based on an *interpretation* of specific language in the Agreement. In *W.R. Grace,* on the other hand, the arbitrator did not even purport to be interpreting the applicable agreement, but essentially ruled that the grievances should be denied regardless of whether the collective bargaining agreement was breached.

The third issue presented in *W.R. Grace* is whether an employer may be held liable for back pay to laid-off employees when the employer selected those employees for lay-off pursuant to the mandate of an EEOC conciliation agreement. *See* Petition for Writ of Certiorari in *W.R. Grace & Co., supra.* This issue obviously is not present in this case, because the Company has not maintained that its actions were based on an attempt to comply with any judicial or administrative order.

Because none of the issues raised in the *W.R. Grace* case are raised in the instant case, the Union's petition for writ of certiorari should not be granted on the basis of any relationship between these two cases.

IV. THE STANDARD FOR AWARD OF ATTORNEY'S FEES ANNOUNCED BY THE CIRCUIT COURT DOES NOT CONFLICT WITH DECISIONS OF THIS COURT.

As a fourth and final reason for the issuance of a writ of certiorari, the Union argues that the Eleventh Circuit's decision was contrary to decisions of this Court, insofar as the Eleventh Circuit ruled that the Union may be liable for attorney's fees if its refusal to comply

with the Award was without justification. Specifically, the Union cites *Summit Valley Industries v. Carpenters Local Union 112*, 102, S. Ct. 2112 (1982), where this Court held that under 29 U.S.C. § 303, attorney's fees can only be awarded in accordance with the "American Rule." Under the American Rule, attorney's fees are awardable only in limited circumstances, such as where a party acts in bad faith or in willful disobedience of a court order.

Summit Valley Industries does not appear to have any bearing on this case. While *Summit Valley Industries* involved an action under 29 U.S.C. § 303, this case involves an action under § 301. This difference is of great importance, because this Court previously has held that unlike most other statutes, § 301 grants the federal courts broad authority to fashion a federal common law with respect to actions for breach of a collective bargaining agreement. *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 450-56 (1957); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981). In accordance with this statutory mandate, a number of courts of appeals have held that attorney's fees may be awarded against a party that refuses to abide by a labor arbitration award, if that refusal is "without justification." *See e.g., United Steelworkers of America v. United States Gypsum Co.*, 492 F.2d 713, 734 (5th Cir.), *cert. denied*, 419 U.S. 998 (1974). Indeed, even if the American Rule for the award of attorney's fees does apply to § 301 actions, it would appear that the "without justification" standard which has been fashioned by the courts of appeals fits within the "bad faith" exception or "willful disobedience of a court order" exception to the American Rule.

In any event, it does not appear that this issue is ripe for consideration by this Court, since the Eleventh Circuit held only that attorney's fees *might* be awardable in this case. There has been no final determination either by the Eleventh Circuit or by the District Court as to

whether the Company is entitled to an award of attorney's fees under the circumstances of this case. Therefore, it would be premature to grant a writ of certiorari on this issue, inasmuch as this issue has not been fully litigated or finally decided in the courts below.

CONCLUSION

For the reasons stated above, the Union's petition for a writ of certiorari should be denied.

Respectfully submitted,

DUANE C. ALDRICH
Counsel of Record
R. SLATON TUGGLE, III
KILPATRICK & CODY
3100 Equitable Building
Atlanta, Georiga 30043
(404) 572-6500

ROBERT P. BARTON
LOCKHEED-GEORGIA COMPANY
86 South Cobb Drive
Marietta, Georgia 30063
(404) 424-3388

Attorneys for
Lockheed-Georgia Company